SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 241

HERMAN SNYDER, PETITIONER,

vs.

COMMONWEALTH OF MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, COMMONWEALTH OF MASSACHUSETTS

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[fol. 1]

IN SUPERIOR COURT OF MIDDLESEX COUNTY

Criminal. No. 5891

COMMONWEALTH

vs.

HERMAN SNYDER and JOHN A. DONNELLON

Summary of the Record

On the sixth day of April, 1932, the Grand Jury for the County of Middlesex returned the following

INDICTMENT

COMMONWEALTH OF MASSACHUSETTS.
Middlesex, To wit:

At the Superior Court begun and holden at the city of Cambridge, within and for the County of Middlesex, for the transaction of criminal business, on the first Monday of April, in the year of our Lord one thousand nine hundred and thirty-two.

The Jurors for the Commonwealth of Massachusetts on their oath present, that James T. Garrick, Herman Snyder and John A. Donnellon on the ninth day of April in the year of our Lord one thousand nine hundred and thirty-one at Somerville in the County of Middlesex aforesaid, did as-
[fol. 2] sault and beat one James M. Kiley with intent to kill and murder him, and by such assault and beating did kill and murder said James M. Kiley.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Frank G. Volpe, Assistant District Attorney.
Harold R. Acres, Foreman of the Grand Jury.

Arraignment and Plea

And it appearing to the Court that the said indictment charged the said defendant Snyder with a crime punishable with death, it was ordered by the Court that said Herman Snyder be held in the custody of the Sheriff of said County of Middlesex to answer to said indictment, and that he be notified that said indictment as to him would be entered forthwith upon the docket of said court by causing him to be served with an attested copy of said indictment and of the orders of the court thereon, as soon as conveniently might be. In obedience to said orders, said defendant was notified as thereby required; said indictment was entered of record upon the docket of said court, and notice thereof, together with a copy of said indictment, was sent to the Chief Justice of said Superior Court and to the Attorney General for said Commonwealth.

On the sixth day of April, 1932, the defendant Snyder was arraigned and had the indictment read to him to which he pleaded that he was not guilty, and for trial thereof put himself upon the country. On the twelfth day of said April, the court appointed A. C. Webber, Esquire, counsel for the defendant Snyder.

Subsequently, it appearing to the court that the said indictment charged the said Donnellon with a crime punishable with death, it was ordered by the court that the said John A. Donnellon be held in the custody of the Sheriff of [fol. 3] said County of Middlesex, to answer to said indictment and that he be notified that said indictment as to him would be entered forthwith upon the docket of said court by causing him to be served with an attested copy of said indictment and of the orders of the court thereon, as soon as conveniently might be. In obedience to said orders, said defendant was notified as thereby required; said indictment was entered of record upon the docket of said court as to said Donnellon, and notice thereof, together with a copy of said indictment, was sent to the Chief Justice of said Superior Court and to the Attorney General for said Commonwealth.

On the second day of May, 1932, the said Donnellon was arraigned and had the indictment read to him to which he

pleaded that he was not guilty, and for trial thereof put himself upon the country, and on the same day, the court appointed William H. McDonnell, Esquire, counsel for him.

On the thirteenth day of May, 1932, a report of investigation into the mental condition of the defendant Herman Snyder was filed in the case, viz:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

REPORT OF INVESTIGATION INTO THE MENTAL CONDITION OF HERMAN SNYDER

Chapter 105, Acts of 1929

The Commonwealth of Massachusetts, Department of Mental Diseases

May 13, 1932.

To the Clerk of the Superior Court for the County of Middlesex:

As provided by Chapter 105, Acts of 1929, this Department has been notified that Herman Snyder is held for trial in the above-named court charged with the crime of murder. I have caused an examination of said Herman Snyder to be made "to determine his mental condition and the existence [fol. 4] of any mental disease or defect which would affect his criminal responsibility."

The said Herman Snyder was examined on April 7, 12, 22 and May 3, 1932 by Drs. Ball and Barrett.

The report of the examination is transmitted herewith.

Respectfully yours, Winfred Overholser, Assistant Commissioner.

Report to Department of Mental Diseases

(On Mental Examination of Prisoner under Chapter 105, Acts of 1929)

Name: Herman Snyder.

Examined at Middlesex Co. Jail Apr. 7-12-22, and May 3, 1932.

Indicted or bound over for trial for the crime of Murder.

1. Age, 21. Religion, Jewish. Color, White.

2. Occupation, Printer.

3. Single; married; widowed; divorced; separated: Single.

4. Birthplace, Boston, Mass.

5. Residence, 90A West Cedar Street.
(a) How long there, 2 yrs.
(b) How long in Massachusetts, Life.
(c) How long in United States, Life.

6. Nearest relative (State relationship), Mother. Name and address, Sadie Snyder, Same address.

7. Attorney, A. C. Webber.

8. History of physical and mental condition: So far as can be ascertained prisoner was born normally and walked and talked as the other children of the family, but is described by the mother as being a nervous child, easily stirred up and excitable and having a violent temper. She tells that when he was 4 or 5 yrs. old he had several fainting spells during which he was unconscious but as he grew older [fol. 5] these stopped but he was still subject to extreme spells of temper and that following these he would have to be put to bed. Prisoner denies that he ever had convulsions but has fainted several times when he was undergoing physical examination, and he fainted when this examiner did a physical examination on him at the jail. He had influenza in 1918—Tonsillectomy about 10 yrs ago—Gonorrhea 2 yrs. ago followed by epididimytis. Has never been considered an exceptionally strong person physically.

9. Education: Is said to have entered school at about 7 yrs. and graduated from 9th grade at 16—and was an average pupil—Teachers are said to have found him easy to deal with, alert and keen. He left school at 16 before completing prevocational training.

10. Employment:
(a) History of employment: Following graduation he has worked at odd jobs—such as orderly at Mass. Gen. Hosp., Bay State Fish Co., O'Hara Fish Co., Carver N. E. Press—Grays Tire Shop—Waterman's Greater shows—Chauffeur etc. Never stayed long at any job.

(b) Earning capacity: Will probably average $12 to $15 per week.

11. Habits:
(a) Alcohol: Uses some—gets drunk occasionally.
(b) Drugs: None.
(c) Sex: Heterosexual—Gonorrhea 2 yrs. ago.

12. Previous arrests, convictions and sentences 1926: Receiving stolen property—Probation. 1931—Carrying a sling shot—suspended sentence.

13. Social adaptability and interest in social life: Prisoner is described as being an irritable person—not caring for home—preferring to be on the streets and he states that he enjoys gang life and that he likes to be with persons who "live like real guys".

[fol. 6] 14. Psychiatric findings. This prisoner has been interviewed on 5 different occasions. At the time of the first interview he talked freely—was correctly oriented—stated he had been apprehended in Philadelphia where he had been for almost a year except for one or two trips on vessels to the south coast of the U. S. He was well informed about how he was apprehended and seemed to have enjoyed the trip back by air plane. He did not seem concerned about his present predicament and stated that he was not worried about it. No delusions could be developed and false perceptions of any kind could not be elicited. During subsequent interviews he has not been so co-operative but would talk some. During the 2nd interview he did submit to a superficial physical examination but fainted during stethoscopic examination of the chest and since then has refused further physical examination. For the most part he has been rather defiant, flippant and evasive. On Apr. 9 Samuel J. Beck, Psychologist at the Boston Phychopathic Hospital attempted to do an intelligence test but he was not co-operative and test was not satisfactory. From history developed from mother and others, this prisoner has had since he was 4 or 5 years old, some sort of seizures during which he would become unconscious, froth at the mouth and bite his tongue. At times he has wet his clothing during these. We can not develop any history of recent seizures of this sort—the last being observed when he was about 17 yrs. old. But he has been

given to periods of violent temper during which he would throw things at others. We have not been able to observe any such seizures but the description strongly suggests that they may be epileptic in nature. We do not consider that he is normal but do not find that he is now insane.

15. State definitely whether, in the opinion of the examiner, the prisoner is suffering from any mental disease [fol. 7] or defect which would affect his criminal responsibility: In our opinion the prisoner is possibly an epileptic and not normal but we do not consider him insane. He appears to be of average intelligence.

Family History: Father—Jacob Snyder—born in Russia 1880—Came to U. S. 1907—Barber by trade. Committed as insane 1922—Died 1926. Paternal uncle—Abraham Snyder committed as insane 1925. Mother—Sadie Mussman—born in Poland 1881—Living. Prisoner is the 3rd of 7 children and there is no definite evidence of mental disease in any although several have been considered behavior problems.

J. E. Barrett, M. D. Arthur N. Ball, M. D.

On the same day, a report of investigation into the mental condition of the defendant James A. Donnellon was filed, and is as follows:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

REPORT OF INVESTIGATION INTO THE MENTAL CONDITION OF JAMES A. DONNELLON

Chapter 105, Acts of 1929

The Commonwealth of Massachusetts, Department of Mental Diseases

May 13, 1932.

To the Clerk of the Superior Court for the County of Middlesex:

As provided by Chapter 105, Acts of 1929, this Department has been notified that John A. Donnellan is held for trial in the above-named court charged with the crime of murder.

I have caused an examination of said John A. Donnellan to be made "to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility."

[fol. 8] The said John A. Donnellan was examined on May 3, 1932 by Drs. Barrett and Ball.

The report of the examination is transmitted herewith.

Respectfully yours, Winfred Overholser, Assistant Commissioner.

Report to Department of Mental Diseases

(On Mental Examination of Prisoner under Chapter 105, Acts of 1929)

Name: John A. Donnellan.
Examined at Middlesex Co. Jail May 3, 1932.
Indicted or bound over for trial for the crime of Murder.

1. Age, 23; Religion, Roman Catholic; Color, White.

2. Occupation, Marine fireman.

3. Single; married; widowed; divorced; separated: Single.

4. Birthplace, Boston, Mass.

5. Residence, Los Angeles, Cal.
(a) How long there? 1 year.
(b) How long in Massachusetts? Life up to 1 year ago.
(c) How long in United States? Life.

6. Nearest relative (State relationship), Sister. Name and address, Mollie Donnellan, Boston (street not known).

7. Attorney, Wm. McDonald.

8. History of physical and mental condition: In Boston City Hospital five days summer of 1930 for treatment of head injury (laceration of forehead and concussion). Good recovery except for occasional neuralgic pains in forehead. Gonorrhea "about a year and a half ago". Good recovery. Denies knowledge of other illnesses.

9. Education: Completed 8th grade public school at 14. Never repeated grades.

[fol. 9] 10. Employment:

(a) History of employment: Went to sea as fireman after leaving school. Has followed the sea most of his life since although working occasionally as chauffeur and truck driver.

(b) Earning capacity $75 per month and found as marine fireman.

11. Habits:

(a) Alcohol, Periodically intemperate:

(b) Drugs, Denied.

(c) Sex, Normally heterosexual.

12. Previous arrests, convictions and sentences "Six or seven" arrests for drunk. Fined. Two arrests for Misapp. of auto—Probation and 30 Days Deer Island 1930. One arrest for Larceny of auto tires—Served 11 mos. Shirley 1925.

13. Social adaptability and interest in social life: Chooses male associates usually. Takes part in amateur athletics. Reads considerable light fiction as well as newspapers.

14. Psychiatric findings: Prisoner is correctly oriented—willing to co-operate during the examination. No delusions nor hallucinations could be elicited but prisoner is somewhat depressed and anxious about this present situation, although not abnormally so. He is of normal intelligence and a psychometric examination gives him a mental age of 163 with an I. Q. of 102.

15. State definitely whether, in the opinion of the examiner, the prisoner is suffering from any mental disease or defect which would affect his criminal responsibility: In our opinion the prisoner has no mental disease or defect.

Social Investigation: Prisoner born in Boston July 20, 1908, one of 9 children. He is a twin, brother having died at birth. Parents Irish. Early life spent in congested Back Bay district, much of his time being spent on the streets and in freight yards and city lots. Father is reported to have been a periodical drinker and this made [fol. 10] home life very disagreeable, but prisoner is said to have been very fond of his father. Father eventually left home and the family is said to have done better fol-

lowing this. The mother died in 1923 when prisoner was 15 yrs. old and an older sister, Mary, undertook to carry on the household. Prisoner entered school at age of 5 yrs. and graduated from Myles Standish Prevocational School in 1923. He was never very industrious about getting work, and is said to have spent much of his time with a gang which did not work, and he has made at least two trips across the continent in a desultory search of employment. Has done such work as marine fireman, work in wheat fields of So. Dakota, truck driver, usher in theatres, roustabout with Ringling's Circuit. Since 1921 he has been in conflict with the police and in 1925 was sent to Shirley—a total of 22 arrests have been found—a number of these have been for drunkenness. There is no history of mental disease in the family so far as could be developed.

J. E. Barrett, M. D. Arthur N. Ball, M. D.

On the sixteenth day of May, 1932, it was ordered by the court that this case is subject to General Laws, Chapter 278, as amended by Acts of 1925, Chapter 279, and Acts of 1926, Chapter 329.

On said sixteenth day of May, the defendant Snyder filed the following motion for a bill of particulars, which motion was allowed by the court:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

MOTION OF DEFENDANT HERMAN SNYDER FOR BILL OF PARTICULARS

The defendant, Snyder, says that the offence charged against him and by said indictment is not fully, plainly, substantially and formally set out therein, and that in order to prepare for his defence, he desires information as to [fol. 11] time, place and means and requests the Court order the Commonwealth to file a Bill of Particulars specifying:

1. As to time: The exact date and exact time of the day when said crime was committed.

2. As to place: The exact location of the building, if there was a building, and the place on the premises where said murder was committed.

3. As to means: The manner, how, and by what acts and means the offence charged was committed, including an exact description of any weapon claimed to have been used by any defendant in the commission of the crime alleged in the indictment.

4. To specify which particular defendant in fact did actually assault and beat the said James M. Kiley.

5. As to the crime itself: The Commonwealth is asked to specify whether the offence alleged was—

(a) Murder committed with deliberately premeditated malice aforethought.

(b) Murder committed with extreme atrocity or cruelty.

(c) Murder committed in the commission of a crime punishable with death or imprisonment for life.

(d) Murder committed in the attempted commission of a crime punishable with death or imprisonment for life.

(e) If it is claimed that the murder consisted of murder committed in the commission of a crime, the Commonwealth shall specify what the crime was and by reference to any statute defining said crime.

(f) If it is claimed that the murder was committed in the attempted commission of a crime, the Commonwealth shall specify which crime is referred to, what the attempts consisted of, and what acts of this defendant constituted said attempt.

By His Attorney, A. C. Webber.

[fol. 12] And on the same day, the Attorney for said Commonwealth filed the following, viz:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

ANSWERS TO DEFENDANT'S MOTION FOR SPECIFICATIONS

Now comes the Commonwealth and in answer to motion for bill of particulars of defendant Herman Snyder, and specifies as follows:

1. April 9, 1931, in Somerville, Massachusetts, between the hours of 7:15 and 8 P. M.

2. In a building located and occupied by the Cities Service Refining Company as a gasoline station at number 13 Somerville Avenue, Somerville, Massachusetts.

3. Deceased was murdered as a result of a bullet fired from a thirty-two calibre Colt Automatic pistol, the bullet going through his heart and coming out of his back.

4. The defendant, Herman Snyder, fired the shot from said pistol that killed James M. Kiley.

5. The Commonwealth specifies that this murder was committed with deliberately premeditated malice aforethought, and also murder committed in the attempted commission of a crime punishable by imprisonment for life, to wit: robbery while armed, as defined in Chapter 265, Section 17 of the General Laws.

6. And the Commonwealth further says that the defendant, Herman Snyder, entered said gasoline station and while armed attempted to rob the deceased, and shot and killed the deceased with a thirty-two Automatic Colt pistol.

For the Commonwealth, F. G. Volpe, First Ass't District Attorney.

On the seventeenth day of said May, 1932, the defendant Snyder filed the following motion:

[fol. 13] In Superior Court of Middlesex County

Motion of Defendant Snyder to Attend View

The defendant Snyder requests permission to be present at the view, and that is necessary to acquaint his Counsel with facts necessary to his defence; that the Dist. Atty. has had a co-defendant at the scene of the alleged murder and has secured information thereby, presumably against this defendant.

That to deny the request of this defendant is to deprive him of rights guaranteed him under the Constitution of the United States and amendments thereto and particularly Art. VI thereof and the Constitution of Massachusetts, and the Declaration of Rights, and particularly Art. 12 thereof.

By His Attorney, A. C. Webber.

This motion was denied by the Court.

Subsequently a jury was empanelled for the trial of the indictment as to the defendants Snyder and Donnellon, and on the twenty-fourth day of May, 1932, the defendant Snyder filed the following:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

MOTION OF DEFENDANT SNYDER FOR DIRECTED VERDICT

And now comes this defendant and severally moves, that upon all the Evidence, that the Court direct the jury

1. To find a verdict of not guilty as against defendant Snyder.

2. That a verdict of murder in the first degree cannot be found as against said Snyder.

By His Attorney, A. C. Webber.

And said motion was denied by the court.

IN SUPERIOR COURT OF MIDDLESEX COUNTY

VERDICT

On the twenty-fourth day of May, 1932, the jury, after hearing all matters and things concerning the said indict-
[fol. 14] ment, returned their verdict therein and upon their oath said that said Herman Snyder and John A. Donnellon are severally guilty of murder in the first degree.

On the seventh day of June, 1932, the defendant Herman Snyder filed a claim of appeal, viz:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

CLAIM OF APPEAL

Now comes the defendant, Herman Snyder, in the above entitled cause and claims an appeal from certain opinions, orders, rulings, directions, instructions, and judgments made by the presiding Justice during the course of the trial of said cause, and every way in which questions of law were reserved for review, the details of said appeal to be more specifically set forth in defendant's Assignment of Errors, to be hereinafter filed.

Herman Snyder, By His Attorney, A. C. Webber.

On the tenth day of said June, the defendant John A. Donnellon filed the following

IN SUPERIOR COURT OF MIDDLESEX COUNTY

CLAIM OF APPEAL

And now comes the defendant, John A. Donnellon, in the above entitled cause and claims an appeal from certain opinions, orders, rulings, directions, instructions, and judgments made by the presiding Justice during the course of the trial of said cause, and every way in which questions of law were reserved for review, the details of said appeal to be more specifically set forth in the defendant's assignment of errors, to be hereinafter filed.

John A. Donnellon, by William H. McDonnell, His Attorney.

[fol. 15] On the twentieth day of June, 1932, a copy of the Transcript of the Evidence was delivered to the Clerk of Courts.

On the nineteenth day of September, 1932, a written notice of the completion of the Summary of the Record was given to counsel for defendants Snyder and Donnellon.

On the twenty-eighth day of September, 1932, the defendant Snyder filed the following:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

ASSIGNMENT OF ERRORS OF THE DEFENDANT SNYDER

Now comes this defendant and files the following assignment of errors. Reference is made to the exceptions as numbered in the Transcript of the Evidence, and to the pages therein for the convenience of the Court, but such references are not to exclude other parts of the Transcript, nor are the grounds stated to exclude other grounds that are suggested by the claim, and required to fairly raise all questions of law.

1. This defendant assigns as error, the order and ruling requiring the trial to proceed without the defendant Garrick, who was jointly indicted with this defendant, because it violated a positive right of this defendant to be tried as

the grand jury directed by their indictment, and tended to convey to the jury the belief that the Government regarded Garrick less culpable than this defendant, to his prejudice.

(Exceptions 1 and 2. Transcript, pages 4-12.)

2. This defendant assigns as error, the refusal of the Court to permit examination of venireman, Claude E. Furze, concerning an opinion formed by him through reading the papers to enable this defendant to bring to the attention of the Court grounds for a challenge for cause and also to guide the defendant as to the necessity of a peremptory charge.

(Exceptions 3 and 4. Transcript, pages 17-20.)

3. This defendant assigns as error, the refusal of the Court to permit examination of venireman, Edward B. Gel- [fol. 16] dert, concerning an opinion formed by him through reading the papers to enable this defendant to bring to the attention of the Court grounds for a challenge for cause and also to guide the defendant as to the necessity of a peremptory charge.

(Exceptions numbers 5, 6, and 7. Transcript, pages 21-25.)

4. This defendant assigns as error, the ruling and direction requiring the clerk to read the Commonwealth's Specifications to the jury after objection made to this procedure by this defendant, because the office of said specifications was merely to inform the defendant of certain facts to enable him to present his defense, and the reading of said specifications tended to the prejudice of this defendant before the jury.

(Exception number 8. Transcript, pages 31-33.)

5. This defendant assigns as error, all proceedings that occurred in relation to the view taken by the jury; the refusal to permit this defendant to be present; the denial of his written motion, and the order and direction to take a view in this defendant's absence, because this was in violation of the constitutional right of this defendant under the Constitution of the United States and the Constitution of Massachusetts which guarantee the right of defendants in capital cases to be present at all stages of the trial and to face his accusers, and to be present when testimony is offered against him.

(Exception number 9. Transcript, pages 35-39. See also written motion in record. See also reference in charge to view, page 966.)

6. This defendant assigns as error, the refusal to permit the medical examiner to explain his testimony in regard to the location, direction, and course of the bullet wound by reference to a similar location on some other person, because the medical examiner testified he did not keep measurements of the deceased and the testimony excluded as required by necessity of the case and would tend to corroborate this defendant that he did not fire the shot which killed the deceased.

[fol. 17] (Exceptions numbers 12 and 13. Transcript, pages 162-170).

7. This defendant assigns as error, the admission of testimony of the medical examiner, upon objection, that what he saw was consistent with that bullet going through the body of the man.

(Exceptions numbers 14 and 15. Transcript, pages 180-182.)

8. This defendant assigns as error, the admission of testimony of Mrs. McPherson, over his objection, that he, Snyder, the defendant Donnellan, and one Consalvi (who was not indicted) were seen together on March 23, 1931, in Boston, because evidence was not indicative of any act on part of this defendant tending to prove the guilt of the charge in this indictment, and operated to his prejudice.

(Exception number 25. Transcript, page 247.)

9. This defendant assigns as error, the admission of the testimony, over his objection, of the result of a certain experiment made by witness Van Amburgh, on the ground that the fact testified to was not sufficiently established and connected as to constitute evidence tending to prove the guilt of this defendant of the charge in the indictment.

(Exceptions numbers 29, 30, 31, 32, 33, 34A, 35 and 35A. Transcript, pages 277-299.)

10. This defendant assigns as error, the admission, over his objection, of the evidence of Gertrude Rogers, that she had seen guns in a room, in which the defendant merely happened to be present some days before the finding of said guns, because it was undisputed that the defendant had left

Boston several days before the finding of these guns, and could not be bound by what took place thereafter.

(Exceptions numbers 40, 41, 42 and 43. Transcript, pages 332-336.)

11. This defendant assigns as error, the ruling of the Court admitting, over his objection, statements made by [fol. 18] the defendant Donnellan to Police Captain Damery not in the presence of this defendant, which tended to implicate this defendant in the murder, and as evidence against him, because narrative statements made by Donnellan under those circumstances could not bind this defendant who was not present and participated therein.

(Exceptions numbers 40, 41, 42 and 43. Transcript, pages 332-338.)

12. This defendant assigns as error, the ruling of the Court admittting, over his objection, confessions and admissions of the defendant Donnellan, in which there are statements of Snyder's conduct, on the ground that such statements of Donnellan could not bind Snyder who was not present at the time when the confession of Donnellan was made and because the reading of such statements of Snyder's conduct to the jury would be bound to prejudice him, even though the Court did say to the jury that Donnellan could not bind Snyder.

(Exceptions 46 and 47. Transcript, pages 385-388.)

13. This defendant assigns as error the admission, over his objection, of a statement by Donnellan to the police, in the absence of Snyder, that the gun that Donnellan saw at the police station was the one that Garrick handed to Snyder before the murder, the said gun being the one that the Commonwealth claimed and offered evidence tending to prove killed Kiley.

(Exception 55. Transcript, page 405.)

14. This defendant assigns as error, the ruling of the Court admitting, over his objection, statements of Donnellan not made in the presence of this defendant, referring to a gun as the one that Snyder had, that it was the gun that did the killing; that the gun "come up with that bunch at the West End there"; that a certain cap was the cap that Snyder wore; and that he (Donnellan) saw Snyder clean the gun by putting oil into it, and the purpose for

cleaning the gun, and other testimony of what Snyder did just before the robbery and at the filling station.

(Exceptions 56, 57 and 58. Transcript, pages 405-411.)

[fol. 19] 15. This defendant assigns as error, the ruling of the Court denying the motion of the defendant Snyder for the services of a medical expert, which motion is on file.

(Exception 59. Transcript, pages 425-431.)

16. This defendant assigns as error, the ruling of the Court excluding an inquiry, in the cross-examination of the Witness Garrick, that he knew that if he ever came up before another jury he could change his story.

(Exception 61. Transcript, page 456.)

17. This defendant assigns as error, the refusal of the Court to permit the cross-examination of the witness Garrick as bearing on his credibility that he was trying to get his counsel to get this case on for trial before Snyder and Donnellan returned.

(Exceptions 62 and 63. Transcript, pages 472, 473.)

18. This defendant assigns as error, the refusal of the Court to admit evidence of witness, James A. Downes, on the ground that the Commonweath's witness, McNulty, picked him (Downes) as one of the two men that were running from the station, on the ground that this testimony, if admitted, would tend to affect the credit to be given to the testimony of McNulty.

(Exceptions 64 and 65. Transcript, pages 567, 568.)

19. This defendant assigns as error, the refusal of the Court to admit a photograph of the defendant's father who died insane in Danvers, and the uncle of the defendant, who is now an inmate of an institution as an insane patient, because there was a similarity in likeness between both and the defendant himself, and would have some weight upon the mind of the ordinary person, to prove that insanity was an inheritable trait of the defendant. It is agreed that the photograph will be shown to and used in the argument before the Supreme Judicial Court.

(Exceptions 66 and 67. Transcript, pages 596-600.)

20. This defendant assigns as error, the exclusion of testimony of what this defendant's mother said at the time [fol. 20] of the occurrence of an epileptic seizure of the defendant, on the ground that what the mother said was part of the res gestæ.

(Exception 69. Transcript, pages 611, 612.)

21. This defendant assigns as error, the refusal of the Court to admit testimony describing the acts of the defendant's insane father at Danvers, as being evidence of the form of insanity from which the father was suffering.

(Exceptions 70 and 71. Transcript, page 613.)

22. The defendant assigns as error, the exclusion of the testimony of Dr. Fairbanks in describing what opportunity he had to make a study of the defendant, as a basis of giving an opinion on the ground that such testimony is material to explain the doctor's final opinion as given to the jury.

(Exception 71A. Transcript, page 648.)

23. This defendant assigns as error, the admission of testimony, over his objection, through the witness, Van Amburgh, as to an approximate direction of the bullet, and the position and conduct of the deceased at the time of the shooting, on the ground that such testimony was within the knowledge of the ordinary person who was as qualified as the witness to give his opinion on the subject.

(Exceptions 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85. Transcript, pages 705-713.)

24. This defendant assigns as error, the denial of the motion filed by him—first, that the jury be directed to find a verdict of not guilty—and second, that a verdict of murder in the first degree cannot be found against Snyder.

(Exception 89. Transcript, page 870.)

25. This defendant assigns as error, the refusal of the Court to give his requests for rulings as follows: Requests Nos. 7, 11, 12, 13, 14, 15, 16, 17, 21, 27, 33, 34, 35, 37, 38, 38A, 38B, 40, 41, 47 and 48 to 52 inclusive.)

(See Transcript, pages 863-868 and 870-874.)

[fol. 21] The defendant objected to the instruction given as to the weight to be given to the testimony of accomplices.

It is agreed that the requests as presented to the Court

will be part of the record and transcript to avoid the necessity of repeating the same here.

26. This defendant assigns as error, that part of the charge in which the Court said that "a killing in self-defense in the case of robbery was first degree and not second degree"; the statement that "one must be absolutely without mental capacity"; the statement of the Court of what a defendant charged with being a party to a common enterprise must do before he can be relieved of responsibility.

(Exceptions 91 and 92. Transcript, pages 1009-1012.)

27. This defendant assigns as error, the refusal of the Court to grant the motion and request of this defendant, at the time of verdict, that each juryman should be polled as to whether the verdict of guilty of murder in the first degree was his verdict.

(Exceptions 93 and 94. Transcript, pages 1017 and 1018.)

By His Attorney, A. C. Webber.

On the fourteenth day of October, 1932, to which time the filing thereof had been extended by the Court, the defendant Snyder filed an Additional Assignment of Errors, and the defendant Donnellon filed his Assignment of Errors, both of which are as follows:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

ADDITIONAL ASSIGNMENTS OF ERROR OF DEFENDANT HERMAN SNYDER

Now comes this defendant and within the time allowed by the extension granted by the Court, files the following additional assignments of error:

23A. This defendant assigns as error the admission of [fol. 22] testimony, over his objection, of the result of a certain experiment made by witness Van Amburgh, on the ground that the experiment as to the effect of powder marks indicating the distance at which the pistol was held from the point of entrance could not be determined by experiment, unless a similar material to that worn by the

decedent Kiley at the time of his death was used in the experiment.

(Exception 86. Transcript, pages 714, 715.)

25A. By including within the parentheses to Assignment #25, the following: "See exception 88, page 867; exception 93, page 1026; exception 94, page 1027; and see also pages 1020 to 1033."

Requests #48, 49, 51 and 52 are as follows:

"Request #48. It is generally unsafe to convict upon the uncorroborated testimony of an accomplice."

"Request #49. The fact that the testimony of Garrick and Donnellan tends to connect them with the commission of the offense, are matters proper for your consideration in determining the weight to which their testimony is entitled."

"Request #51. The source of this kind of evidence is so corrupt, that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation."

"Request #52. The testimony of an accomplice should be scrutinized with extreme caution, and it is not safe or prudent to convict upon evidence of accomplice alone, unless corroborated, in important, material and vital issues."

Request #27 referred to in Assignment #25 is as follows:

"The jury are alone qualified to pass upon the question of mental capacity of the defendant. 'It is not a question of medical science, nor of legal definition, although both may materially assist you. It is a question for your common and practical sense.' "

25B. The defendant further assigns as error the refusal of the Court to give request #44 as follows:

[fol. 23] "If the defendants intended to enter the building when no one was there and steal from the building and to abandon the enterprise if intercepted or anyone should come into the building, and that the guns were to be used only to frighten off and not injure pursuers, then the defendant Snyder cannot be found guilty of murder in the first degree."

By His Attorney, A. C. Webber.

In Superior Court of Middlesex County

Assignment of Errors of the Defendant Donnellan

Now comes this defendant and files the following assignment of errors. Reference is made to the exceptions as numbered in the Transcript of the Evidence, and to the pages therein for the convenience of the Court, but such references are not to exclude other parts of the Transcript, nor are the grounds stated to exclude other grounds that are suggested by the claim, and required to fairly raise all questions of law.

1. This defendant assigns as error, the order and ruling requiring the trial to proceed without the defendant, Garrick, who was jointly indicted with this defendant, because it violated a positive right of this defendant to be tried as the grand jury directed by their indictment, and tended to convey to the jury the belief that the Government regarded Garrick less culpable than this defendant, to his prejudice.
(Exceptions 1 and 2. Transcript, pages 4-12.)

2. This defendant assigns as error, the refusal of the Court to permit examination of venireman, Claude E. Furze, concerning an opinion formed by him through reading the papers to enable this defendant to bring to the attention of the Court grounds for a challenge for cause and also to guide the defendant as to the necessity of a peremptory charge.
(Exceptions 3 and 4. Transcript, pages 17–20.)

[fol. 24] 3. This defendant assigns as error, the refusal of the Court to permit examination of venireman, Edward B. Geldert, concerning an opinion formed by him through reading the papers to enable this defendant to bring to the attention of the Court grounds for a challenge for cause and also to guide the defendant as to the necessity of a peremptory charge.
(Exceptions 5, 6 and 7. Transcript, pages 21–25.)

4. This defendant assigns as error, the ruling of the Court admitting testimony of the witness, Captain Damery, against objection, to admissions made by the defendant Donnellan on board train leaving Los Angeles.
(Exception 16. Transcript, pages 220–223.)

5. This defendant assigns as error, the refusal of the Court to permit the witness, Captain Damery; to testify to what he (Damery) told this defendant that the defendant. Snyder said.

(Exception 17. Transcript, page 225.)

6. This defendant assigns as error, the ruling of the Court admitting testimony of Mary MacPherson as to the hiring of a room by this defendant.

(Exception 21. Transcript, page 233.)

7. This defendant assigns as error the ruling of the Court admitting in evidence the testimony of the witness, Mary McPherson, of the finding of a gun under a pillow of a bed in a room when this defendant was not present.

(Exceptions 22, 23, 24, 25 and 26. Transcript, pages 241–243.)

8. This defendant assigns as error, the ruling of the Court admitting the testimony of Officer Coleman as to who was in a certain room and what was found in that room when this defendant was not present.

(Exceptions 27 and 28. Transcript, pages 251, 252. See also cross-examination page 257 et seq.)

9. This defendant assigns as error, the ruling of the defendant admitting testimony of the witness, Captain Van [fol. 25] Amburgh, because no sufficient connection was established between the gun and bullet with this defendant.

(Exceptions 32, 33, 34, Transcript, pages 279-280. Also Exceptions 36 and 37, 38 and 39. Transcript, page 324.)

10. This defendant assigns as error, the ruling of the Court excluding part of the confession of this defendant made in the district attorney's office and taken down in shorthand by a stenographer.

(Exceptions 44, 45. Transcript, page 385. See also exceptions 48, 49, 50, 51, 52, 53 and 54. Transcript, pages 392–401.)

By His Attorney, William H. McDonnell.

And the said indictment as to James T. Garrick stands continued.

The foregoing is a true copy of the Summary of the Record and of the Assignments of Errors.

Attest:

——, Clerk.

[fol. 26] And said case was continued for the determination of the Supreme Judicial Court for the Commonwealth.

RESCRIPT OF SUPREME JUDICIAL COURT

On the first day of April, A. D. 1933, a rescript from said Supreme Judicial Court was filed in the case in words following, to wit: "Judgment on the verdict."

IN SUPERIOR COURT OF MIDDLESEX COUNTY

JUDGMENT

And now, on this eighteenth day of April, A. D. 1933, the said defendants Herman Snyder and John A. Donnellon, each being under the custody of the Sheriff of said County, again come before the Court, in his own proper person, and thereupon Frank G. Volpe, Assistant District Attorney for the Northern District of said Commonwealth, moves that the sentence provided by law be passed upon them, the said Herman Snyder and John A. Donnellon, upon which it is demanded of the said Snyder and Donnellon if they have or know aught to say why the Justice here present ought not, upon the premises and the plea and the conviction of the said Snyder and said Donnellon to proceed to pass sentence upon them, who nothing further hath to say except as before they hath said.

Whereupon, all and singular the premises being seen and understood by the Justice here, it is considered and ordered by the Court that said Herman Snyder suffer the punishment of death by the passage of a current of electricity through his body within the week beginning on Sunday, the eleventh day of June in the year of our Lord one thousand nine hundred and thirty-three.

And it is also considered and ordered by the Court that said John A. Donnellon suffer the punishment of death by

the passage of a current of electricity through his body within the week beginning on Sunday, the eleventh day of June in the year of our Lord one thousand nine hundred [fol. 27] and thirty-three.

Warrant for execution issued vs. Snyder.

Warrant for execution issued vs. Donnellon.

(1933, April 18, Certified copies of whole record of conviction and sentence delivered to the Governor. Warrants for execution delivered to the Sheriff. Certified copies of warrants transmitted to the Warden of State Prison.)

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 27½] [Endorsed:] Commonwealth of Massachusetts vs. Herman Snyder and John A. Donnellon. Certified copy of record.

[fol. 28] In Supreme Judicial Court of Massachusetts

Commonwealth

vs.

Herman Snyder & Another

Middlesex. Argued December 5, 1932

Present: Rugg, C. J.; Crosby, Pierce, Field, & Lummus, JJ.

Homicide, Common enterprise. Practice, Criminal, Separate or joint trial; Questioning of venireman; Bill of particulars; View; Exceptions: waiver. Jury and Jurors. Evidence, Competency, Illustration, Relevancy, Statement by coconspirator.

Assignment of errors, alleged by the defendants to have been committed at the trial in the Superior Court before T. J. Hammond, J., of an indictment charging murder.

Opinion—Filed April 7, 1933

Pierce, J.:

This case comes before this court on appeal on assignments of error. The defendants, with one James T. Gar-

rick, were indicted for murder in the first degree of one James M. Kiley at Somerville on April 9, 1931. The defendants Herman Snyder and John A. Donnellon were put on trial and found guilty of murder in the first degree. Both defendants claimed an appeal and assigned as errors the judge's ruling to proceed with the trial without Garrick; the judge's denial to allow the defendants to interrogate certain persons called as jurymen; and numerous exceptions taken during the trial to the admission and exclusion of evidence. The defendant Snyder also excepted (1) to the judge's denial of his motion to accompany the jurymen to a view; (2) to a denial of his motion for a directed verdict; (3) to the refusal to give the jury certain [fol. 29] requests; and (4) to the denial of his motion that the jury be polled after the verdict.

The evidence is voluminous but the salient facts may be briefly summarized as follows: On April 9, 1931, at about 7:45 p. m., one James M. Kiley was shot and killed while employed as an attendant in the gasoline station operated by the Cities Service Refining Company on Somerville Avenue in Somerville. A government witness, William M. McNulty, testified that he was across the street from the gasoline station and heard a shot and then saw two young men rush out of the gasoline station and get into a moving automobile which disappeared in the traffic. He ran over to the gasoline station, saw the deceased on the floor, still conscious, but unable to talk, and in his right hand, between the second and third fingers, was a burning cigarette.

Kiley was removed to a hospital and was pronounced dead when he arrived. The bullet went through his heart and out through his back, striking a pane of glass located on the east side of the gasoline station. The police found the bullet back of an oil tank standing beside the rear door; the shell was found on a rack of oil containers at the right of the entrance of the station.

On April 29, 1931, the Boston police raided a second floor room in a rooming house conducted by a Mrs. McPherson at 665 Massachusetts Avenue, Boston. In this room they found three revolvers, one of which was a thirty-two automatic, which the jury would be warranted in finding killed the deceased. Donnellon had left the room just previous

to the raid. In the room were four men, one of whom was Garrick. He, Donnellon, and two other men, and a girl, Gertrude Rogers, who was a friend of Donnellon and occupied a room on the fourth floor, were arrested. Snyder had left Boston at this time. Donnellon was later released, but Garrick was held.

On April 4, 1932, Snyder was apprehended in Philadelphia where he had assumed the name of Peter Manuel. After his arrest he admitted his identity and signed a statement that on April 9, 1931, he and Donaldson (Donnellon) went into the gasoline station in Somerville to hold up [fol. 30] the man and rob him; that he did not fire the shot that hit the man; that he heard a shot and ran and got into the automobile which Garrick had stolen and was driving. Snyder was brought back to Somerville, and in the presence of a stonographer amplified his original statement.

On April 14, 1932, the defendant Donnellon was apprehended in California. He was brought back to Massachusetts. En route he made a statement to the chief of police of Somerville admitting his part in the affair and implicating Snyder and Garrick. Upon his return, in the presence of a stenographer, he admitted that he, together with Snyder and Garrick, on April 9, 1931, started out with the purpose of holding up someone; that they stole an automobile on St. Botolph Street, Boston; that Snyder drove it and just before they got to the gasoline station in Somerville where the deceased worked Garrick took the wheel; that one of them said, "That looks like a pretty good place," and they decided to go in; that it was understood that Donnellon and Snyder were to go in the station and Garrick was to remain at the wheel; that they all three had loaded revolvers; that on the way to Somerville the defendant Snyder changed guns with Garrick, Snyder receiving the thirty-two automatic pistol from which the bullet that killed the deceased was fired; that Donnellon went into the station first and Snyder was over to the left of him, in back; that the deceased was just hanging up the receiver of the telephone which was on the side of the wall, and Donnellon said to him, "Stay where you are"; that the deceased kept walking toward him and grabbed his necktie, and then he heard a shot and ran out of the gasoline station with Snyder; that at that time he had a thirty-two revolver and Snyder had a thirty-two automatic; that they jumped

into an automobile which Garrick was driving and went in the direction of Union Square and then to Boston, where they abandoned the automobile; that before abandoning it they rubbed from it the finger prints; that they went back to the room on Massachusetts Avenue, and the gun that did the shooting was there cleaned by Snyder with oil and, with [fol. 31] the other two guns, was hidden. Snyder testified that as he got in the car he said to Garrick, "Beat it"; and Garrick testified that Snyder said: "I have shot the man."

The statements of Snyder and Donnellon made before the trial do not agree on the possession of the thirty-two automatic and as to just what occurred at the gasoline station. Snyder's statement in substance was that he had a revolver, that he thought Donnellon had an automatic; that Donnellon walked into the gasoline station and he walked in after him; that when he got in there Donnellon and Kiley were not grabbing each other but something like that; that he closed the door, heard the noise of a shot, and ran out; and that Donnellon came out after him. On the witness stand Snyder testified that he was half way in the station, saw Donnellon and Kiley fighting, sparring like, and that he said, "Beat it" and ran out; that he heard a shot when he was just stepping in the automobile, and that after he got in Donnellon got in. Donnellon's testimony on the stand was in substantial agreement with his previous statement, except that on the stand he testified that he had just got outside the door when he heard the shot. On the witness stand Garrick testified in substance in accord with the testimony of Donnellon. He testified that Snyder and Donnellon told him that they were going out to hold up a store or somebody and that he decided to go with them; that he had the big automatic (which was in evidence exhibit 26), gave Donnellon the hammerless and Snyder had the twenty-five automatic; that Snyder asked for the big automatic and he swapped with him and took the twenty-five automatic. He testified that he drove right opposite the door of the gasoline station and Snyder and Donnellon went in; that after the shot both ran out of the gasoline station; that when Snyder got in the car he said, "For Christ's sake get out of here" "I have shot the man" and that after they returned to Boston they poured oil through the one gun, wiped off the three guns, and put them away.

Evidence was given by a ballistic expert to the effect that he had made experiments with the shell and bullet found in [fol. 32] the gasoline station with a thirty-two automatic pistol, identified as the one which Snyder had (if the testimony of Donnellon and Garrick is believed) at the time of the shooting, and expressed the opinion that the bullet that killed Kiley was fired from that particular gun. It was admitted at the trial that James M. Kiley, the individual named in the indictment, died on the night of April 9, 1931, as a result of a gunshot or pistol wound.

Certain specifications were filed at the request of Snyder. In these specifications it is contended by the Commonwealth that Snyder did the actual shooting. The request of Snyder and the answer of the Commonwealth were read to the jury against the objection of the defendant Snyder.

We now consider the assignments of the defendant Snyder.

1. The first assignment of error is based on exceptions one and two and relates to the allowance of the motion by the Commonewalth that the trial proceed against Snyder and Donnellon and not against Garrick. The question of separate or joint trials rests in sound judicial discretion, Commonwealth v. Gallo, 275 Mass. 320, 326, Commonwealth v. Borasky, 214 Mass. 313, Commonwealth v. Sacco, 255 Mass. 369, 413, which was not abused on the reported evidence in this case. The contention that the exercise of judicial discretion required a hearing upon facts presented to the judge in support of the request of the district attorney is not supported by the decisions. The judge appears to have acted in the exercise of his discretion and the question is not presented whether (as has been said) it is optional with the prosecuting attorney to try the defendants jointly or separately unless the judge grants a severance on the motion of one or more of the defendants. United States v. Wilson, 28 Fed. Cases, No. 16,730. People v. Clark, 102 N. Y. 735. Reg. v. Richards, 1 Cox C. C. 62. See State v. Francis, 152 S. C. 17, and, on the issue raised by the defendant, note to that case and collection of cases in 70 A L. R. 1171, 1178, 1179.

2. The second and third assignments of error consist of exceptions three, four, five, six and seven. They may be [fol. 33] considered together, and are so considered in the

brief of the defendant and of the Commonwealth. They relate to the refusal of the judge to permit examination of the veniremen Claude E. Furze and Edward B. Geldert concerning opinions formed by each of them, through reading the papers, to enable the defendant to bring to the attention of the judge grounds for challenge for cause and also to guide the defendant as to the necessity of a peremptory challenge. In each instance the veniremen Furze or Geldert stated that the opinion formed by him from reading the papers would not preclude him from following the evidence and rendering a verdict on the testimony given under oath. The judge ruled that each of them stood indifferent. Thereupon the venireman Furze was challenged by Donnellon and the venireman Geldert was challenged by Snyder. The defendant concedes that G. L. (Ter. Ed.) c. 234, § 28, was not intended to give a party defendant the right to submit a venireman to cross-examination in order to elicit facts tending to show bias or prejudice on the part of a juror, but contends that, within the rule stated in Commonwealth v. Cero, 264 Mass. 264, at page 271, something appeared which made it proper to go beyond the usual course of procedure, in that the veniremen openly indicated the forming of opinions. There is nothing in this contention. Furze responded in the affirmative to the question put by the judge: "You believe you could follow the evidence and render your verdict without being swayed by what you had read?" Geldert likewise responded in the affirmative to the question put by the judge: "That is, you would be able to follow the evidence and disregard anything you had read in the papers?" In these circumstances there was no occasion for the judge to go further than to follow the established rule. Commonwealth v. Webster, 5 Cush. 295. Holt v. United States, 218 U. S. 245, 248. The ruling was free from legal error.

3. The fourth assignment of error is based on exception eight, and assigns as error the ruling and direction requiring the clerk to read the Commonwealth's specifications to the jury after objection made to this procedure by this defendant (Snyder) because the office of said specifications [fol. 34] was merely to inform the defendant of certain facts to enable him to present his defence, and the reading of the specifications tended to prejudice this defendant be-

fore the jury. It is obvious this procedure was warranted, as the Commonwealth contends it was, by the language used in Commonwealth v. Howard, 205 Mass. 128, 145, Commonwealth v. Peakes, 231 Mass. 449, 456, and in Commonwealth v. Gedzium, 259 Mass. 453, 457. The governing statute, G. L. (Ter. Ed.) c. 277, § 40, authorizes the judge to have the specifications read to the jury. The reason for allowing a defendant to obtain a bill of particulars is to inform him fully of the nature of the offence "where the indictment alone does not sufficiently inform the defendants, and this as matter of right." Commonwealth v. Farmer, 218 Mass. 507, 509. Commonwealth v. Belenski, 276 Mass. 35, 40. The specifications affect the proof, mode of trial and the indictment, and are a part of the record. Commonwealth v. Gedzium, 259 Mass. 453, 457, 458, and cases cited. Indeed the defendant was not prejudiced by the procedure followed, for the district attorney rightfully could and did present the same facts to the jury in his opening.

4. The fifth assignment of error rests on exception nine and relates to all proceedings that occurred in relation to the view taken by the jury, the refusal to permit Snyder to be present, the denial of his written motion "to attend view" and the order and direction to take a view in this defendant's absence, and alleges that this refusal was in violation of the constitutional rights of the defendant under the Constitution of the United States and the Constitution of Massachusetts which guarantee the right of a defendant in capital cases to be present at all stages of the trial and face his accusers and to be present when testimony is offered against him. The decisions on the question relating to view in criminal cases are in conflict in other States. The cases recognizing the right of the accused to be present when such view is had do so chiefly on the ground that either it is a part of the trial, or, since the jury have the right to treat the information received during the view as [fol. 35] evidence, the accused, under the Constitution, has a right to be confronted by the witnesses and therefore must be present. See note to Noell v. Commonwealth (135 Va. 600), 30 A. L. R. 1345, 1357, where the cases are reviewed; see also note to People v. Thorn (156 N. Y. 286), 42 L. R. A. 368. At common law, except upon an indictment for criminal nuisances, a view was not allowed in criminal

cases "without mutual consent." Commonwealth v. Handren, 261 Mass. 294, 297. In this Commonwealth the judge by Rev. Sts. c. 137 § 10, now G. L. (Ter. Ed.) c. 234, § 35, was given authority to "order a view by any jury empanelled to try a criminal case." It is now settled that a view is not such a taking of evidence as violates the constitutional right of the defendant "to meet the witnesses against him face to face." Commonwealth v. Dascalakis, 246 Mass. 12, 31. 3 Wigmore on Evidence (2d ed.) § 1803. It is expressly decided in Commonwealth v. Dascalakis, 246 Mass. 12, 31, that the defendant in a capital or other criminal case could waive whatever rights he had to accompany a jury on the view, and it was said that "There are obvious practical objections to the contention that as matter of right a defendant in a criminal case may accompany the jury on a view. The whole subject rests in the sound discretion of the court." It was decided in Commonwealth v. Belenski, 276 Mass. 35, that the refusal in that case to permit the defendant to accompany the jury on a view was within the sound discretion of the trial judge, citing Commonwealth v. Dascalakis, 246 Mass. 12, 28–31. The defendant Snyder in support of his motion to be present at the view argued the broad ground of legal right to be present at all times during the course of the trial and thereby to acquaint his counsel with the facts thus secured which might be necessary to aid in his defence. The attorney for the defendant Donnellon in support of the motion said: "In order for my client to understand and to see the things so that he can either disclaim or rebut the evidence presented against him, I want him in my presence to point out the things." The judge said: "I am not sure but that can be arranged." [fol. 36] Counsel for Donnellon then said: "I do not care whether it is done in the presence of the jury." The judge then decided it would not be for the best interest of any one to have the prisoners go with the jury but stated: "On the other hand, I will consider the question as to whether or not an opportunity will be given you, if after going there you cannot understand the situation, to go there with your client alone, under proper supervision, provided, of course, that no comment is made by yourself in advance that any such thing would happen or any intimation given to the press. I will consider that and see what you decide after you go to the scene this morning." After the view the request was not renewed. There is nothing in the record which dis-

closes that the defendants were deprived of effective aid in the preparation and defence of their case that would have been afforded by their presence at the view. We see no error in the trial judge's refusal to grant the motion. The defendant's contention that the refusal to grant the motion is a violation of art. 14 of the Amendments to Constitution of the United States in that it is a denial of "effective aid in the preparation and trial of a capital case," and therefore is a denial of due process of law, citing Powell v. Alabama, 287 U. S. 45, 52, 57, 58, is unsound, in that the chief purpose of a view is to enable the jury to understand better the testimony which has been or may be introduced, and because the view is not a part of the trial, it being suspended while the view is taken. Commonwealth v. Dascalakis, 246 Mass. 12, 29–30. See Commonwealth v. Slavski, 245 Mass. 405, 413.

5. The sixth assignment of error rests on exceptions twelve and thirteen and relates to the refusal of the judge to permit the medical examiner to illustrate before the jury "the location, direction, and course of the bullet wound" by referring "to a similar location on some other person." In his discretion the judge could have granted this request. State v Hoagland, 39 Idaho, 405, 422. The defendant was permitted to and did examine the medical examiner in great detail in reference to the body of the deceased. There is no error shown by the refusal.

[fol. 37] 6. The eighth assignment of error is based on exception twenty-five, and relates to the admission of testimony of the landlady of the rooming house in which the "fatal" gun was found by the Boston police, to the effect that she saw Snyder and Donnellon together at her rooming house some two weeks before the murder. The defendant Snyder rests his objection on the contention that the evidence was not indicative of any act on his part tending to prove the guilt of the charge in the indictment. The evidence was clearly admissible to show the relations existing between the two men, and Snyder in his testimony admitted his presence in this particular house both before and after the murder.

7. The tenth assignment of error rests on exceptions forty, forty-one, forty-two and forty-three. It relates to the testimony of one Gertrude Rogers that she saw guns in the room at 665 Massachusetts Avenue in the early part of

the evening of April 29, 1931. The defendant Snyder objects to this evidence as binding upon him "because it was undisputed that the defendant had left Boston several days before the finding of these guns, and [he] could not be bound by what took place thereafter." The finding of objects in the house of another without a showing that the defendant was connected in any way either with the house or with such other person is inadmissible; McBride v. Commonwealth, 95 Va. 818; but the connection was here shown. The Commonwealth introduced evidence to show that one of the guns found in this room, when the police raided it a few hours after Gertrude Rogers had seen the guns there, was the "fatal" gun, and this gun was traced into the hands of Snyder on the night of the murder. Snyder testified that he was with Donnellon in Gertrude Rogers's room on the floor above at about 12:30 in the morning following the night of the murder. The evidence tended to prove that Donnellon hired and occupied the room where Gertrude Rogers saw the guns and that he had stepped out of the room just before the raid by the police. There was no error in the admission of this testimony. Moreover, the judge speaking of exception forty-three said to counsel for the [fol. 38] defendant: "I don't understand that anything is in up to this point, but if there is anything that counsel desire now to offer, it may go in." This was not followed by any offer of proof. These exceptions could therefore properly be treated as waived.

8. Assignments of error eleven to fourteen are considered together in the defendant's brief and we so treat them. The eleventh assignment relates to the ruling of the judge admitting statements of Donnellon made a year after the shooting to the chief of police of Somerville, not in the presence of Snyder, which tended to implicate Snyder in the murder; the twelfth, thirteenth and fourteenth assignments of error rest on exceptions forty-six, forty-seven, fifty-five, fifty-six, fifty-seven and fifty-eight, and relate to the ruling of the judge admitting part of the statements made by Donnellon to the district attorney in the presence of a stenographer, in which there were statements implicating Snyder in the murder. It is settled that declarations, admissions, or confessions made after the conspiracy has

ended bind only the maker, and cannot be used in evidence against other members of the conspiracy not present when they are made. Commonwealth v. McDermott, 255 Mass. 575, 581. This evidence never was admitted against Snyder. The jury were instructed in every proper way not to consider this evidence against Snyder. They were told: "This [evidence] is admitted only as against Donnellon. Keep that in mind even though there be references to any acts of either of the others who it is alleged were there"; and again, at the conclusion of the reading of the statement of Donnellon, the judge said: "It is not admitted as against Snyder. It is only admitted as against Donnellon, and I again repeat that to the jury." This was all that was required of the judge. Commonwealth v. Rogers, 181 Mass. 184, 193.

9. The sixteenth and seventeenth assignments of error, based on exceptions sixty-one, sixty-two and sixty-three, are considered together. They relate to the cross-examination of Garrick, who was called by the Commonwealth, the object being to affect the credibility of Garrick by showing "that [fol. 39] he was trying to get his counsel to get this case on for trial before Snyder and Donnellon returned." The questions for this purpose excluded were (1) "And you knew that if you ever came up before another jury, you could change your story, couldn't you?" (2) "Your attorney, Mr. Daly, tried to get this case on for trial before they got Snyder and Donnellon?" (3) "You knew then that the government, or you realized or thought that the government had no evidence against you?" The defendant contends that these questions were well within the limits of reasonable cross-examination "to prove interest or bias or prejudice" and he, Snyder, had the right to have them answered as an absolute right and not within the discretion of the judge, citing Commonwealth v. Russ, 232 Mass. 58, 79, Commonwealth v. Sansone, 252 Mass. 71, 74, See Commonwealth v. Marcellino, 271 Mass. 325. There was no offer of proof and in the absence thereof it is plain the questions in themselves had no tendency to show interest, bias or prejudict. Commonwealth v. Sansone, 252 Mass. 71. The questions were rightly excluded.

10. The eighteenth assignment of error rests on exceptions sixty-four and sixty-five, and relates to the rulings of the judge wherein he refused to admit evidence of a witness,

Downes, that McNulty had picked him out as one of the two men he saw running from the gasoline station. If it be assumed that the evidence would have a tendency to contradict McNulty and was therefore admissible, Snyder suffered no material harm by its exclusion for the reason that he testified himself to running out of the gasoline station and getting into the car.

11. Assignments of error twenty to twenty-two inclusive, based on exceptions sixty-nine to seventy-one A, are considered together. They relate to the issue of insanity. One Danzinger, testifying as to the conduct of Snyder upon an occasion when the witness was visiting the Snyder family, was asked by counsel for Snyder: "What did the mother say to him on this occasion?" referring to an incident which arose during the service of a dinner to the children, and which followed the action of the mother when she went over [fol. 40] to Snyder and "says, 'Hermie, this is your plate,' and he sat down and * * *" Exception sixty-nine relates to what, if anything, the mother said. The defendant made no offer of proof, but contends that the statement of the mother, whatever it was, was a part of the res gestæ and that it would tend to illustrate and explain the conduct of Snyder which followed. It does not appear that the excluded utterance related to the circumstance of the occurrence which preceded it or that it would give a "complete picture" of an event otherwise incomplete. 3 Wigmore on Evidence (2d ed.) § 1750. "It is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved." Commonwealth v. Chance, 174 Mass. 245, 251. The same witness testifying as to a visit made on Snyder's father in Danvers was asked to "Describe what you saw in Danvers." The evidence was excluded rightly; it was too broad, and if it were applicable to the condition of the father, it would be no better. The Commonwealth had admitted the insanity of the father and the particular form or manifestation of it was not material to any issue in the case. The defendant assigns as error the exclusion of testimony of one Dr. Fairbanks "in describing what opportunity he had to make a study of the defendant, as a basis of giving an opinion on the ground that such testimony is material to explain the doctor's final opinion as given to the jury." This assignment was based on exception seventy-one A. This exception

was disallowed. However, the defendant was not harmed for the witness subsequently testified as to just what opportunity he had to make a study of the defendant.

12. The next assignment of error, twenty-three, rests on exceptions seventy-two to eighty-five inclusive and relates to the admission of the testimony of the witness Van Amburgh, an expert in firearms evidence in the department of public safety, given under cross-examination by counsel for the defendant Donnellon as to the approximate direction of the bullet and the position of the deceased at the time of the shooting. The contention of the defendant Snyder is "that such testimony was within the knowledge of the [fol. 41] ordinary person who was as qualified as the witness to give his opinion on the subject." The questions were in part based on the hypothesis of the bullet entering the body from left to right, leaving the body an inch or two below the right shoulder. The testimony pertained to a knowledge of anatomy, of the vital organs of the human body and the course of the projectile through it. It cannot be presumed the jury would not be aided by the technical knowledge of the witness. Commonwealth v. Dorr, 216 Mass. 314, 317. Commonwealth v. Festo, 251 Mass 275, 280. The testimony of the witness did not involve any expression of opinion on disputed questions of fact. Stoddard v. Winchester, 157 Mass. 567, 575. The procedure followed was in conformity with the rule laid down in Commonwealth v. Russ, 232 Mass. 58, 73-74. Whalen v. Rosnosky, 195 Mass. 545, cited by the defendant, is plainly distinguishable. There was no error in the admission of this testimony.

13. The next assignment of error, twenty-three A, rests on exception eighty-six and relates to the testimony of the same witness, Van Amburgh, as to the effect of powder marks for the purpose of determining the distance at which the pistol was held from the body of Kiley. The defendant contends that the evidence was improperly admitted "since the witness did not use the same material in his experiments as that worn by Kiley at the time of the shooting." The experiments were not made under identical conditions but were made under such similar conditions as naturally would tend to throw light on the point in controversy and to assist the jury to arrive at the truth. When Kiley was shot he wore a coarse woolen sweater; the tests were made on both

cotton and wool. It is plain the admission of the evidence was a matter of discretion which was not abused.

14. Assignments of error twenty-five, twenty-five A, twenty-five B and twenty-six relate to requests for rulings and to the charge. The eleventh and seventeenth requests were as follows: "Upon all the evidence, the defendant Snyder is not guilty of the crime of murder in the first degree." "The jury is not warranted in concluding upon the evidence that the shooting of the decedent was done with deliberately [fol. 42] premeditated malice aforethough." Counsel for the defendant Snyder states that these requests "sought to have withdrawn from the jury the submission of the issue of murder in the first degree so far as the deliberation and premeditation element was concerned." The point was also raised by motion. Assignment twenty-four based on exception eighty-nine relates to the denial of this motion. On the motion and on the requests it is sufficient to say without a review of the evidence that it is clear the jury were fully warranted in finding that the defendant Snyder with deliberately premeditated malice aforethought shot and killed James M. Kiley. Commonwealth v. Tucker, 189 Mass. 457, 486-496. Requests thirty-four, thirty-five and thirty-seven, which were refused, relate to the use of intoxicating liquor and the mental condition of Snyder. There was evidence that Snyder had been drinking before the killing of Kiley. Snyder testified that he was drunk at the time the car was stolen, and that he was unable to drive. There is no evidence as to his condition due to intoxicating liquor at the time of the commission of the crime; full and accurate instructions were given the jury by the trial judge on this branch of the case, Commonwealth v. Gleason, 262 Mass. 185, 191, Commonwealth v. Taylor, 263 Mass. 356, 362-363, as well as on the mental condition of the defendant. Commonwealth v. Rogers, 7 Met. 500. Commonwealth v. Stewart, 255 Mass. 9, 13-14. Request forty is as follows: "If the defendant Snyder, upon seeing the decedent Kiley struggling with the defendant Donnellon loudly cried out 'Beat it' or 'Run' or some other equivalent expression, and ran out of the filling station intending to withdraw from the common enterprise and thereafter shot was fired, he, Snyder, cannot be found guilty of first degree murder." The refusal of this request was proper. There "was no

basis upon which could have rested a verdict that the defendant made timely abandonment of the criminal enterprise in which he had been a conceded participant. * * * Whatever may be the other requirements of an effective abandonment of a criminal enterprise it is certain both as a matter of law and of common sense that there must be some appreciable interval between the alleged abandon- [fol. 43] ment and the act from responsibility for which escape is sought." People v. Nichols, 230 N. Y. 221, 228-229. Here, the struggle, the alleged call to Donnellon to 'come out, and the fatal shot, were all parts of a single and brief transaction.

15. The seventh assignment of error resting on exceptions fourteen and fifteen, the ninth assignment resting on exceptions twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four A, thirty-five and thirty-five A, the fifteenth assignment resting on exception fifty-nine, the nineteenth assignment resting on exceptions sixty-six and sixty-seven, part of the twenty-fifth A assignment resting on exception eighty-eight, refusals to rule, the twenty-sixth assignment resting on exceptions ninety-one and ninety-two and the twenty-seventh assignment of error resting on exceptions ninety-three and ninety-four, have not been argued and ordinarily would be deemed to be waived. We have, however, examined each and all of the exceptions and find no reversible error. No assignments of error were made by the defendant Snyder as to exceptions fifteen B, nineteen, twenty, sixty-eight, eighty-seven and ninety. These are not open to the defendant under § 33D added to G. L. c. 278 by St. 1925, c. 279, § 1. Commonwealth v. Cero, 264 Mass. 264, 271.

The defendant Donnellon filed ten assignments of error. He filed no brief. We have considered all the exceptions on which they are based and find no reversible error.

Judgment on the verdict.

A. C. Webber (W. J. McCarthy & L. H. Weinstein with him) for the defendant Snyder.

F. G. Volpe, Assistant District Attorney, for the Commonwealth.

[fol. 44] APPENDIX 2 TO PETITION

Request for Rehearing in State Supreme Court and Order (Original)

[fol. 45] I, A. C. Webber, counsel appointed by the Court to represent Defendant Herman Snyder, do hereby certify that the following is a copy of my carbon copy of the original request for a re-hearing directed to the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts on April 3, 1933 in the case of Commonwealth v. Herman Snyder; that I made application to the office of Walter F. Frederick, the Clerk of said court, for a certified copy, and was informed that such petitions are not made part of the court record.

I further certify that the original letter dated April 7, 1933, hereto annexed, denying the application for re-argument was received by me and refers to said Petition for re-hearing; and that a copy of said petition and said letter will be served upon the Attorney General of the Commonwealth, representing the Respondent herein.

A. C. Webber, Counsel appointed by Court for Herman Snyder.

Subscribed and sworn to, before me. William J. McCarty, Notary Public. (Seal of William J. McCarty, Notary Public, Massachusetts.)

Dated at Boston, Mass., August 2, 1933.

[fol. 46] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

In re

COMMONWEALTH

v.

HERMAN SNYDER

PETITION FOR REHEARING—April 3, 1933

To the Honorable the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts:

Respectfully represents Herman Snyder, who stands convicted of the capital crime of murder in the first degree,

that on March 31, 1933 the Supreme Judicial Court in a written opinion, overruled your petitioner's bill of exceptions heretofore duly filed, and argued before this Court on December 8, 1932.

Your petitioner sincerely believes that by accident, oversight or inadvertence, a wrong conclusion was reached in the case which should call for correction, or re-argument.

The error relied upon herein relates to the Fifth Assignment of Error covered by pages 12 to 48 inclusive in your petitioner's brief, and the claim of your petitioner is that the Supreme Judicial Court did not fully consider the following matters involved in the consideration of the matters presented by said Assignment:

1. The opinion does not consider the legal effect of the presence of the presiding justice at the view and his general conduct and control of proceedings in the presence of the jury and thereby making the view a part of the trial, which presence and conduct of the presiding justice is part of the fundamental concept of trial by jury as pointed out in the opinion in the Dascalakis case. (See pages 12-14 of Defendant's Brief.)

2. The opinion does not consider the use which was to be made of the view by the jury according to the charge. (See pages 16-17 of Brief.)

3. The opinion in reply to your petition's argument that he was denied effective aid in the preparation and trial of his case refers solely to a colloquy which took place at the trial between Donnellan's counsel and the trial court, and with which colloquy your petitioner was not concerned and the colloquy relating to your petitioner is not stated or referred to according to page 38 of the Transcript.

4. The opinion does not consider the unbroken and general practice in this Commonwealth with reference to right of a defendant in a capital case to be present at a view where the right is not waived. This practice is set out in pages 30 to 46 inclusive of your petitioner's brief, and illustrated by excerpts from twenty-three murder trials both be-
[fol. 47] fore and since the Dascalakis case, and by the claim of counsel for your petitioner that there is no recorded instance in the judicial history of this Commonwealth or in any other jurisdiction, with the exception of the single in-

stance of Commonwealth v. Belenski, 276 Mass. 35, where this right of the petitioner has been refused where seasonably insisted upon. That the question of practice is involved in the decision of the Dascalakis case upon which authority Commonwealth v. Belenski rests. (See pages 31 to 46 of Brief.)

Wherefore your petitioner prays that in the interest of justice, the opinion of the Supreme Judicial Court with reference to said Fifty Assignment of Error be corrected, or that your petitioner be permitted to re-argue the case on said Fifth Assignment of Error.

Herman Snyder, by His Attorney, A. C. Webber.

[fol. 48] COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT

ORDER DENYING REHEARING—April 7, 1933

A. C. Webber, Esq., 1113-18 Barristers' Hall, Boston, Massachusetts.

DEAR SIR: Your application for reargument in 7266, Commonwealth v. Snyder, has been considered by the full court and is denied.

Yours truly, Arthur P. Rugg, Chief Justice.

[fol. 49] Clerk's certificate as to Chief Justice, omitted in printing.

[fol. 50] SUPREME COURT OF THE UNITED STATES

STIPULATION RE APPENDIX II TO PETITION

It is hereby agreed that Appendix II to the petition in the above entitled action may be added to the Record.

A. C. Webber, Attorney for Petitioner. Joseph E. Warner, Attorney General, by Geo. B. Laurie, Assistant Attorney General, Attorney for Respondent.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the Superior Court in and for the County of Middlesex, Commonwealth of Massachusetts is granted, and the case is advanced and assigned for argument on Monday, November 6th next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,844. Massachusetts Superior Court in and for the County of Middlesex. Term No. 241. Herman Snyder, petitioner, vs. Commonwealth of Massachusetts. Petition for a writ of certiorari and exhibit thereto. Filed July 5, 1933. File No. 241, O. T., 1933.

FILE COPY

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 241

HERMAN SNYDER, PETITIONER,

vs.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX IN THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

A.

Summary Statement of the Matter Involved.

Your petitioner was indicted on the sixth day of April, 1932, by the Grand Jury for the County of Middlesex in

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the Commonwealth of Massachusetts, of the crime of murder, and held without bail thereon, to which indictment on the same day your petitioner pleaded that he was not guilty; on the twelfth day of April, 1932, the presiding justice of said court appointed A. C. Webber as counsel for your petitioner; on the sixteenth day of May, 1932, the jury in said cause was empaneled, and your petitioner was put to trial for the crime charged in the indictment.

On the seventeenth day of May, 1932, said Commonwealth made a motion for a view by the jury of the scene of the alleged crime. Your petitioner objected to any view by the jury unless he was personally present at said view. Your petitioner also filed a written motion insisting upon his right to be personally present at said view by the jury, and that it was "necessary to acquaint his counsel with facts necessary to his defense." (R. 11.) The court granted the motion of said Commonwealth, denied the right of your petitioner to be personally present at said view, refused to permit your petitioner to be personally present, and denied your petitioner's motion to which your petitioner duly excepted. (Appendix 1, pp. 34-37.) On the same day the jury, accompanied by the presiding justice, the court stenographer and the court officers, and *all counsel* but not accompanied by your petitioner, went to the scene of the alleged crime, where said Commonwealth's counsel pointed out to the presiding justice that in certain respects the scene of the alleged crime was different on the date of the view than it had been on the date of the alleged crime and where said presiding justice stated to the jury that in certain respects the scene of the alleged crime was different on the date of the view than it had been on the date of the alleged crime, all of which was taken down by said court stenographer and was made part of the Transcript of said trial. (Appendix 1, pp. 37-40).

On the twenty-fourth day of May, 1932, the jury returned a verdict of guilty of murder in the first degree, and thereafter your petitioner claimed an appeal, filed his assignment of errors and his bill of exceptions in said cause.

On the sixth day of April, 1933, the Supreme Judicial Court of Massachusetts, the highest court of said Commonwealth in which a decision could be had, by opinion reported in 1933 Massachusetts Advance Sheets, p. 809 (185 N. E. 376), overruled your petitioner's exceptions and affirmed the conviction and has since denied a rehearing of said cause. On the eighteenth day of April, 1933, the Superior Court in and for the County of Middlesex, by a final judgment sentenced your petitioner to the penalty of death by electrocution within the week beginning with Sunday, the eleventh day of June, 1933, and on the fourteenth day of June, 1933, His Excellency, Joseph B. Ely, Governor of said commonwealth, granted reprieve of the execution of said sentence for the period of thirty days.

B.

Reasons Relied on for the Allowance of the Writ.

1. The refusal of the presiding justice to permit your petitioner to be personally present at the view by the jury of the scene of the alleged crime was a denial of the right of your petitioner to face his accusers, meet the witnesses face to face and to be personally present when evidence was offered against him, as prescribed in Part I, Article XII of the Constitution of said Commonwealth and a violation of Article XIV of the Amendments to the Constitution of the United States.

2. The refusal of the presiding justice to permit your petitioner to be personally present at the view by the jury of the scene of the alleged crime, wherein and whereat the presiding justice, accompanied by the jury, the court

stenographer and the court officers, and all counsel took part, controlled and directed proceedings, was a denial of the right of the defendant to be personally present at all stages of the trial and a violation of Article XIV of the Amendments to the Constitution of the United States.

3. The statement by the presiding justice to the jury in the absence of your petitioner that in certain respects the scene of the alleged crime was different on the date of the view than it had been on the date of the alleged crime was a denial of the right of your petitioner to face his accusers, meet the witnesses face to face, and to be personally present when evidence was offered against him as prescribed in Part I, Article XII of the Constitution of said Commonwealth and a violation of Article XIV of the Amendments to the Constitution of the United States.

4. The refusal by the presiding justice to permit your petitioner to be personally present at the view of the scene of the alleged crime and to "acquaint his counsel (appointed by the court) with facts necessary to his defence," to observe changes himself at the scene of the alleged crime from the date of the alleged crime to the date of the view, and to refresh his recollection of the material arrangements, distances and situations of objects at the scene of the alleged crime, was a denial of effective aid in the preparation and trial of your petitioner's case and a violation of Article XIV of the Amendments to the Constitution of the United States.

5. The denial of the presiding justice of your petitioner's right to be personally present at the view of the scene of the alleged crime, in the light of the long established practice in the courts of said Commonwealth, recognized by justices of the highest learning and experience, acknowledging the right under the law of defendants in capital cases to be

personally present at the view of the scene of the alleged crime (with only two exceptions known to counsel for your petitioner, to wit: the instant case and *Commonwealth* v. *Belenski*, 276 Mass. 35, decided on June 5, 1931, presided over by the same trial justice as in the instant case) was a violation of Part I, Article XII of the Constitution of said Commonwealth and a violation of Article XIV of the Amendments to the Constitution of the United States.

6. The precise Federal questions of substance herein raised have not been heretofore determined by this Court.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Superior Court in and for the County of Middlesex (for criminal business) in the Commonwealth of Massachusetts, commanding said court to certify and send to this Court so much of the transcript of the record and of the proceedings of the said Superior Court had in the case numbered and entitled on the docket No. 5891, *Commonwealth* v. *Herman Snyder*, as is necessary to present the constitutional questions and issues herein involved, to the end that this cause may be reviewed and determined by this Court as provided for by Statutes of the United States; and that the judgment herein of said Superior Court be reversed by this Court, and for such further relief as to this Court may seem meet and proper.

Dated at Boston this thirtieth day of June, 1933.

HERMAN SNYDER.

A. C. WEBBER,
HENRY P. FIELDING,
LEO J. HALLORAN,
LEWIS H. WEINSTEIN,
Counsel for Petitioner.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, MASS., *June* 30, 1933.

There personally appeared the above named Herman Snyder and made oath to the truth of the foregoing statements subscribed to by him, before me.

A. C. WEBBER,
Notary Public in and for the Commonwealth of Massachusetts.

My commission expires October 8, 1938.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1933

No. 241

HERMAN SNYDER, PETITIONER,

vs.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Massachusetts in case against Petitioner is reported in Massachusetts Advance Sheets, (1933) 809, (185 N. E. 376). The writ of certiorari petitioned for is properly directed to the Superior Court in which the record remains and where final judgment was entered.

McDonald v. *Mass.*, 180 U. S. 311 (1901).

II.

Jurisdiction.

The statutory provision sustaining jurisdiction hereof is Judicial Code, Section 237*b* as amended by act of February 13, 1925, 43 Stat. 937 (28 U. S. C. A. sec. 344).

Petition is for review of a cause wherein final judgment has been rendered or passed upon by the highest court of a State in which a decision could be had, in which Petitioner specifically set up and claimed a right under the Constitution of the United States.

III.

Date of Final Judgment.

The date of rescript of the Supreme Judicial Court of Massachusetts is April 6, 1933. The date of sentence to death by electrocution and final judgment of the Superior Court in and for the County of Middlesex is April 19, 1933.

IV.

Statement of Facts.

Petitioner is a citizen of the United States. He was twenty-one years of age at the time of the trial in May, 1932. It is a fair inference from the report on his mental condition, which report is incorporated in the record, that Petitioner is without legal knowledge, not a normal person, or of strong intellect. He is without means. He was indicted, tried, convicted and sentenced to death in the Superior Court for the County of Middlesex of the Commonwealth of Massachusetts, upon an indictment charging Petitioner and two others (Donnellan and Garrick) with the capital crime of murder in the first degree. After arraignment, the court appointed counsel to defend Petitioner. After the trial had begun, and the impanelling of the jury had been completed, the assistant district attorney moved for a view by the jury of the filling station and the locality, the scene of the alleged crime. This filling station was a short distance from the court and within the county and judicial district of the court. It was brought to the attention of the court and at the hearing of the motion

that the assistant district attorney had recently taken a co-defendant (Garrick) who was not to be tried, but was to be used as a Government witness, to the scene and had gone over the case with him there. Petitioner objected to any view by the jury unless he was present and claimed constitutional protection. Petitioner thereupon filed a written motion insisting upon his right, guaranteed by State and Federal constitutions, to be personally present at the view. Petitioner further based his motion—"that it is necessary to acquaint his counsel with facts necessary to his defence." The motion also referred to the taking of Garrick by the assistant district attorney to the scene already alluded to. The court denied that the Petitioner had a right to be personally present at the view, refused to permit the Petitioner to to be personally present at the view, denied his written motion—to all of which Petitioner took an exception. A view was then had by the jury without the personal presence of the Petitioner, and his counsel was obliged to attend without the benefit of such assistance as Petitioner could give if he were personally present. The trial justice was present with the jury at the view, so were the court officers, the court stenographer, and counsel appointed on both sides to attend. At the view the trial justice formally directed and controlled the proceedings. The trial justice at the view stated to the jury agreements of counsel as to facts and changes in the scene that had occurred since the shooting. What occurred at the view was taken down stenographically and appears in the transcript of the evidence as any other part of the trial. In the charge to the jury the trial judge directed without reservation, in accordance with adjudicated cases in Massachusetts, that full use of what was observed by the jury at the view could be used by the jury as evidence in the case upon the issue whether Petitioner had committed the crime of murder in the first degree. Petitioner had been held in custody

without bail since his arrest in April, 1932. The jury were not permitted to separate during the trial until after verdict.

Federal question was specially set up and claimed and brought to the attention of the court at every stage,—orally and by written motion at the time of the view,—in the brief filed on behalf of Petitioner in the Supreme Judicial Court, —and by oral argument in said court. Federal question is discussed in the opinion of the court.

ARGUMENT.

Due Process of Law Required Presence of Petitioner at View.

The judicial act of Mr. Justice Hammond at the trial in the superior court, prohibiting and preventing the Petitioner from being personally present at the view, deprived Petitioner of the protection of the XIV Amendment in that the presence of the defendant was necessary to the fundamental conception of due process of law.

Powell v. *Alabama*, 287 U. S. 45 (1932).

The result reached in *Powell* v. *Alabama, supra,* pointed to the threshold of a door where heretofore only appeared an impenetrable wall. According to that decision, it now may be said that the protection of the due process clause includes within the right of opportunity of being heard, whatever is necessary to assure to the accused, regardless of the merits of the case, all the protection essential to the fundamental conception of a fair and just trial.

No construction of any Massachusetts statute is involved in the case of Petitioner. Massachusetts statutes have never deprived defendants in criminal cases of their right to be present at a view. The only statute relating to view in a criminal case was passed in 1836, in the simplest language—

"The court may order a view by a jury impanelled to try a criminal case."

Rev. Stat. 1836, Chap. 137, Sec. 10.

See also Sec. 9 (Sec. 10 is now General Laws, Ter. Ed. Chap. 234, Sec. 35 and Sec. 9 is Chap. 278, Sec. 6).

For that reason the cases of *Hurtado* v. *California,* 110 U. S. 516, and *Maxwell* v. *Dow,* 176 U. S. 581, and *Holden* v. *Hardy,* 160 U. S. 366, and *Twining* v. *New Jersey,* 211 U. S. 78, 111 and cases there collected, do not apply.

It is not conceded, however, that limitations do not exist upon the legislative power of the States under the XIV Amendment.

See remark of Mr. Justice Moody in *Twining* v. *New Jersey, supra,* at p. 99.

It has been held that while leaning towards an agreement with the views of the State courts, the Supreme Court of the United States exercises an independent judgment in dealing with principles of general law.

Truax v, *Corrigan,* 257 U. S. 312, 324 (1921).

See *B. & O. R. Co.* v. *Baugh,* 149 U. S. 368, 370 (1893).

Decision of State courts "are, at most only evidence of what laws are, and not of themselves law."

See *B. & O. R. Co.* v. *Baugh, supra.*

Thus, the law of Massachusetts upon the question of the right of a defendant to be present at a view in a capital case is open for argument so far as this case is concerned.

Ordinarily, to determine fundamental rights essential to the conception of a fair and just trial in a capital case, recourse is had to the history and origin of our law, "its usages and modes of proceeding." Here, such research is of little value since a view in capital cases was comparatively rare at common law because "it would seem to vio-

late an important principle, that all the proceedings should be in the presence of the accused."

Parker, C. J. in *Com.* v. *Parker,* 2 Pick., 550, 551 (1824).

If granted at all, views were had on the motion of and with the consent of the accused. Even then, doubts were expressed whether in a capital case the accused could be held to his consent.

Com. v. *Knapp,* 9 Pick. 496, 515, 516 (1830).

See *Com.* v. *Handren,* 261 Mass. 294, 297 (1928).

Early statutes in Massachusetts provided for views "in all causes relating to the realty" and later "in all causes relating to real estate."

Mass. Statute, 1784, 7.

Mass. Statute, 1807, 140, section 8.

The language in these early statutes "that either party may have a jury to view the place in question if the court shall be of the opinion that such view is necessary to a just decision", is the language since adopted in most State jurisdictions where view is regulated by statute.

The enabling statute in Massachusetts was passed in 1836 in the simplest language—"The court may order a view by a jury impanelled to try a criminal case" and that, to this day, is all that our Legislature has ever said upon the question of a view in a criminal case. It may be strongly argued that Legislature intentionally refrained from interfering with the fundamental structure of jury trial.

See Rev. Stat. of Mass. (1836) Chap. 137, Sec. 10.

See also Sec. 9, now General Laws, Chap. 234, Sec. 35.

It was by virtue of the above statute that Chief Justice Shaw ruled that authority existed to permit a view in a capital case.

Com. v. *Webster,* 5 Cush, 294, 298, 299 (1850).

Com. v. *Chance,* 174 Mass. 245, 247 (1899).

From 1830 until 1922 counsel have been unable to find any reported decision of the Massachusetts Supreme Court dealing with or doubting the right of the accused to be personally present at a view in a criminal case. In 1922, the matter arose in a case where the presiding judge in the trial court, following the usual practice, recognized the right of the accused to be personally present at a view to exist, and where counsel for the accused in open court waived the right of his counsel to be present at the view.

Commonwealth v. *Dascalakis*, 246 Mass. 12, 29-32.

It is not essential to petitioner's case to dispute the proposition that constitutional rights of a personal nature may be waived and are waived if not seasonably asserted, because Petitioner's right to be present at the view was insisted upon and not waived.

Lebowich, Petitioner v. *Commonwealth*, 235 Mass. 357 (1920).

Commonwealth v. *Dascalakis*, 246 Mass. 12.

To throw light upon the law of Massachusetts up to the point of the Dascalakis case in 1922, in Petitioner's brief before the Supreme Judicial Court, counsel collected from many manuscripts since modern stenographer has come into trial procedure, and set forth proceedings on view in 17 capital cases which occurred from 1892 to 1922. These trials include the celebrated Lizzie Borden case and the Sacco-Vanzetti trial. Five other capital cases from 1925 to 1930 since the Dascalakis opinion were also included. No case was found by counsel of a practice to the contrary. The discussions at these trials were all reported stenographically in full and are set out at length in the brief which is on file as part of petition for certiorari. Language of the most distinguished jurists of Massachusetts appears. The right of the accused to be personally present at a view

in a capital case existed as an unbroken practice and now exists as a matter of law, and the formal waiver by the accused required by the courts was a clear acknowledgment of its necessity under the common law of Massachusetts.

Seventeen of these cases are reported decisions in Massachusetts Reports. The only reference to a view in any of these decisions earlier than the Dascalakis decision is in *Commonwealth* v. *Chance,* 174 Mass. 245, 247 (1899) where it was held that the matter of a view in a criminal case was discretionary and there was no error in denying the request of a defendant for a view. Chief Justice Holmes in the opinion remarks, "the view might have been evidence if it had been taken." It is fortunate that the discussion in the trial court in this case was secured by counsel and is set forth in detail among other cases in brief submitted to Massachusetts Supreme Court by Petitioner (pp. 35-36).

See pages 30-46 of brief of Petitioner in Massachusetts Supreme Court.

The striking feature of this array of fact is that the practice of recognizing the right of personal presence has continued notwithstanding the intimation, by way of *obiter dictum* in the Dascalakis case, that a view is not part of the trial, and that the personal presence of the defendant is a matter of judicial discretion and not of right.

See *Com.* v. *Dascalakis,* 246 Mass. 12 at 30.

With the greatest respect and deference for statements of our Chief Justice, the trial occurrences quoted from in former brief are contrasted with the expression in the Dascalakis case: "but the actual practice as disclosed by highly important capital trials has been that the whole subject has been treated as a function of the court," and against the assistance purely negative sought from the cases of *Commonwealth* v. *Knapp* and *Commonwealth* v. *Webster.*

Then in 1931, in the trial of Joseph Belenski, for the first time in the judicial history of Massachusetts, so far as counsel have been able to ascertain, the precise question of the instant case was raised by the refusal of the trial court to permit an accused in a capital case to be personally present at the view. That case was presided over by Mr. Justice Hammond, who a year later was to preside over the trial of petitioner. The Supreme Court of Massachusetts upon the sole authority of *Commonwealth* v. *Dascalakis,* without any discussion of the point, said there was no error.

Com. v. *Belenski,* 276 Mass. 36 (1931).

Petitioner's counsel claim that these two instances, that of Belenski and that of Snyder, Petitioner, are unique in that they are without parallel in the judicial history of the entire nation. It is thus manifest that this case does not present a situation where the construction of a state statute by a state court is to be reviewed, nor where numerous decisions of long standing of a state court have established a rule contrary to the position taken on behalf of Petitioner. (See p. 11 *supra.*)

Appendix A is an analysis of decisions and authorities dealing with the right of a defendant to be present at a view.

Appendix B is an analysis of the question whether a view is the taking of evidence and shows that upon reason as well as abundant authority, and particularly in Massachusetts, a view is the taking of evidence.

Appendix C is an analysis of cases apparently *contra* to the result herein sought, distinguishing and differentiating cases of waiver, etc., from the instant case.

In case of Petitioner, positive directions of the trial court to the jury were to the effect that the view constituted the taking of evidence and that the view was evidence upon

which the jury might convict Petitioner. (Appendix 1, p. 41.)

Moreover, the view was a proceeding conducted and directed by the trial judge himself. Whether in or out of the courtroom, it was within the trial jurisdiction of the court. Petitioner's claim is that his own presence at the view was necessary to afford him a fair and just hearing and a full and adequate opportunity for defense, necessary for due process, within the meaning of the Fourteenth Amendment. Furthermore, and wholly independent of the right of the state court to declare the law, due process in a capital case entitles an accused to a jury trial as that institution existed at common law.

Within the formula of "a hearing", evidence at a jury trial in a capital case must be offered in the presence of the accused. This is an assurance to the accused by the Massachusetts Constitution, Bill of Rights, Article XII—

> "And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to being fully heard in his defense by himself, or his counsel, at his election * * *".
>
> See also Sixth Amendment to the Constitution of the United States.

There is also the Massachusetts Statute (General Laws, Chapter 276, section 6) which further directs that "A person indicted for a felony *shall not* be tried unless he is personally present during the trial." None of these safeguards have yet been touched in Massachusetts by act of Legislature.

A most fundamental requirement of a fair and just trial at common law and under constitutional and statutory provisions is the necessity of the personal presence of an accused in a capital case at every stage of the trial. And

under the decision of *Powell* v. *Alabama*, 287 U. S. 45 (1932) the protection of the due process clause of the Fourteenth Amendment includes this fundamental right within the right of a fair opportunity of being heard.

This Court in *Lewis* v. *United States*, 146 U. S. 370, 372 (1892) stated:

> "A leading principle that pervades the entire law of criminal proceedings is, that after indictment found, nothing shall be done in the absence of the prisoner."

And in *Hopt* v. *Utah*, 110 U. S. 574, 578, 579 (1884) this Court stated:

> "His (the prisoner's) life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and the court and triers. The necessity of the defense may not be met by the presence of his counsel only."

In *Schwab* v. *Bergren*, 143 U. S. 444, 448 (1892) this Court stated:

> "The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as the time final judgment is rendered against him, may be and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with."

See *Dowell* v. *United States*, 221 U. S. 325 (1911).

The fundamental right to be present at every stage of the trial in a capital case had its roots in the early history of the common law.

See *Rex* v. *Ladsingham*, Sir T. Raymond Reports, 193 (1682).

In I, Cooley, *Constitutional Limitations* (8th ed.) (1927) p. 667, the author states:

"In cases of felony, when the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment."

See I, Bishop, *New Crim. Proc.* (2d ed.) (1913) sec. 273.

In *French* v. *State*, 85 Wis. 400, 411 (1893), the Court said:

"These great common law requirements have been made constitutional provisions in the various states, and so made essential and paramount, and also indispensable in trials for capital offenses and felonies. It is not too strict to hold that in all such cases the accused must be present in court to meet the witnesses face to face * * * These are great constitutional safeguards against oppression and injustice that must not be abridged or compromised."

See also *Maurer* v. *People*, 43 N. Y. 1 (1870).

The proceedings on the view in this case do not relate to matters merely procedural but to matters fundamental in their nature.

Com. v. *Harris*, 231 Mass. 584 (1919).
Lebowich, Petitioner v. *Com.*, 235 Mass. 357 (1920).

The serious handicap of a prisoner charged with a capital offense in the conduct of his defense and in assisting counsel by reason of the custody and restraining incident to a capital case has been judicially taken notice of in a leading case.

See *Diaz* v. *United States*, 223 U. S. 442, 455.

Proceedings at the view conducted by the judge in this case in the absence of the defendant constituted an inseparable part of the trial by jury at which the Petitioner was entitled under fundamental law to be present, and the denial of his right to be present constituted an invasion of

a more substantial right even than the right to assistance of counsel within the principle of *Powell* v. *Alabama, supra.*

Denial of Effective Assistance of Counsel.

In *Powell* v. *Alabama,* at page 71, the court points out that the duty incumbent upon the trial court to supply counsel in a capital case "is not discharged by an assignment at such time or *under such circumstances* as to preclude the giving of effective aid in the preparation and trial of the case."

Petitioner was in custody, without bail. Counsel presented a motion in writing to the trial court asserting the right of Petitioner to be personally present with the jury at the view and that his personal presence was necessary "to acquaint his counsel with facts necessary to his defence."

The time for Petitioner to act in order to preserve his rights was when the prosecution made its motion for a view of the scene. Unless Petitioner then insisted upon being personally present, this important right would have been waived for all purposes and for the entire trial. A matter of strict right would then have become wholly a matter of judicial discretion. It would have been imprudent for Petitioner to speculate upon the mere hope that the discretion of the trial court might at some time later be exercised in his favor. The colloquy between the Court and counsel for the co-defendant, Donnellan, on this point, referred to in the opinion of the Supreme Judicial Court of Massachusetts, does not set forth what immediately followed when counsel for Petitioner clearly made it understood that he objected to any view unless his client was personally present when effective aid to Petitioner's counsel at the scene was most necessary. (Appendix 1, pp. 33-41.) Moreover, the time for most effective assistance by Petitioner's personal presence was at the outset of the trial when the jury had first impressions and possible errors and miscon-

ceptions created in their minds against Petitioner by the evidence which was presented to the jury and the trial court at the scene.

As set forth in this petition (sub-heading B, paragraph 4) the facts bring the case of Petitioner clearly within the language and principles of *Powell* v. *Alabama*, *supra*.

Denial of Equal Protection of the Laws.

The Due Process Clause and the Equal Protection of the Laws Clause of the Fourteenth Amendment are not co-extensive or conterminous in their spheres of protection.

Truax v. *Corrigan*, 257 U. S. 312, 331-332 (1921).

Petitioner was denied equal protection of the laws. Charged with a capital offense he was in custody without bail. He had no control over his presence or absence. Constraint under such circumstances is naturally more strict than in the usual felony case. The serious handicap of an accused under such circumstances in the conduct of his defence and assisting counsel has been judicially noticed by this Court.

See *Diaz* v. *U. S.* 223 U. S. 442, 445 (1912).
Hopt v. *Utah*, 110 U. S. 574, 578, 579 (1884).
Lewis v. *U. S.*, 146 U. S. 370, 374 (1892).

To hold that a prisoner held in custody without bail shall be denied the right to be personally present at a view, while a defendant who is on bail or admitted to bail is free to accompany the jury at the view, would be to deny defendants in capital cases the equal protection of the laws.

See *Powell* v. *Alabama*, *supra*.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory

powers in order that rights under the Constitution of the United States be preserved, and that to such an end a writ of certiorari should be granted, and this Court should review the judgment of the Superior Court of Massachusetts and finally reverse it.

Respectfully submitted,

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APPENDIX A.

Is a view by the jury in a capital case of the scene of the alleged crime, a stage of the trial at which the accused has the right to be personally present if he seasonably insists upon it?

Authority and reason seem forcibly to point in that direction.

Arkansas: *Whitley* v. *State*, 114 Ark. 243, 255 (1914)
"This was a right the defendant had."
Benton v. *State*, 30 Ark. 328, 350 (1875)

Arizona: *Elias* v. *Territory*, 9 Ariz. 1, 11, 15 (1904)
View had on motion of defendant who did not express desire to be present. Neither counsel attended view.

California: *People* v. *White*, 20 Cal. App., 156, 159 (1912)
"And the right of the defendant to be present if he demands it cannot be denied him, without committing a serious irregularity."
People v. *Bush*, 68 Cal. 623 (1886)
People v. *Lowrey*, 70 Cal. 193 (1886)

Florida: *Guardia* v. *State*, 34 Fla. 311, 334 (1894)
"The safest course is to have the defendant present, *Thompson Trials*, ss 886, 887."

Georgia: *Chance* v. *State*, 156 Ga. 428, 433 (1923)
"It was the right of the defendant to be present when the automobile was inspected, in order to make suggestions by himself or through his counsel with respect thereto that he might deem necessary or proper for his defence, and being deprived of this important right * * * a new trial should be granted."

Idaho: *State* v. *McGinnis*, 12 Idaho, 336, 343, 344 (1906)
"We have no doubt of the right of a defendant to be present at such an ex-

amination and inspection in any and every case where he request that privilege."

Indiana: *Barber* v. *State,* 199 Ind. 146 (1927)
Conrad v. *State,* 144 Ind. 290, 298, 299 (1895)
Shuler v. *State,* 105 Ind. 289 (1885) (State statute protects rights of defendants by requiring consent to a view.)

Kentucky: *Freeman* v. *Com.,* 226 Ky. 850, 851 (1928) "Viewing the premises is the receiving of evidence, and that it is error to allow the jury to view the premises in the absence of the accused * * * judgment of conviction must be reversed."
Carney v. *Com.* 181 Ky. 443 (1918)
Riddle v. *Com.,* 216 Ky. 220 (1926)

Louisiana: *Bertin* v. *State,* 24 La. Ann. 46 (1872)

Maine: *State* v. *Slorah,* 118 Me. 203, 215 (1919) "Whatever his rights are to attend, if he demands it, *and we think it should not be denied him in a capital case,* he may in all cases waive them, and the view properly proceed in his absence."

Michigan: *People v. Auerbach,* 176 Mich. 23, 47 (1913) " * * * the respondent had the right to accompany the jury to the view had he desired to do so in this case." (Deft. on bail)
People v. *Hull,* 86 Mich. 449

Massachusetts: (See reports of capital cases set out in brief filed in Massachusetts Supreme Court in this case.)

Mississippi: *Foster* v. *State,* 70 Miss. 755; 765 (1893) (very effective discussion that view is receiving of evidence)

Montana: *State* v. *Landry,* 29 Mont., 218, 226 (1903)

Nebraska: *Carroll* v. *State*, 5 Neb. 31, 35 (1876)
Neal v. *State*, 32 Neb. 120 (1891)
Nevada: *State* v. *Hartley*, 22 Neb. 342 (1895)
N. Hampshire: *State* v. *Buzzell*, 59 N. H. 65.
New York: *People* v. *Palmer*, 43 Hun. 397, 401, 402 (1887)
(very effective discussion that view is evidence)
See dissenting opinion in *People* v. *Thorn*, 156 N. Y. 286, 300 (1898)
Ohio: *Coletti* v. *State*, 12 Ohio App. 104, 106 (1919)
See *Blythe* v. *State*, 47 Ohio St. 234 (1890)
Oklahoma: *Hays* v. *Territory*, 7 Okla. 15, 22 (1898)
"In the absence of statutory provision, there is but little doubt but that the defendant should accompany the jury when sent out to view places or objects, unless he expressly waives that right; * * *"
Starr v. *State*, 5 Okla. Crim. Rep., 440, 467 (1911)
"In making such request (for view), the defendant thereby expressly waives the right of being present at the view. Where the view is had on the request of the prosecution or the court on its own motion directs a view, the safe practice is to permit the defendant to accompany the jury and be present unless he expressly waives the right." (Case contains long discussion and review of authorities.)
Virginia: *Noell* v. *Com.* 135 Va. 600, 606, 621 (1923)
"* * * the authorities are practically uniform in holding that the accused always has the right to attend a view if he does not expressly or by implication waive it, and that it is error to deny him that privilege."

Washington: *State* v. *Hilsinger,* 167 Wash. 427, 437 (1932)

West Virginia: *State* v. *McCausland,* 82 W. Va. 525, 528, 530 (1918)

"There can be no difference in the proffer of objects to the jury in the courtroom and such exhibition by taking the jury to view such objects, when they are not susceptible of being brought into court * * * Under our decisions, the right of the accused in a felony case to be present at every stage of the trial is one he cannot waive * * *"

Wisconsin: *Sasse* v. *State,* 68 Wis. 530 (1887)

"We may say further, in respect to the view in this case, on the trial of a defendant for a capital offense, that we think it very questionable whether it should have been taken in his absence, unless he expressly waived his right to be present."

Textbooks and writers all support the principle that presence of defendant is necessary, unless waived.

I Thompson on Trials, sec. 886, 887.

Franklin Fiske Heard, Report on Trial of Leavitt Alley (Little, Brown & Co., Boston, 1875). Title "View." "View must be made in presence of accused."

12 Harvard Law Review, 211 (1898), Title *"Is a View by Jury Part of the Trial"* (an excellent criticism of statements of court in *People* v. *Thorn,* 156 N. Y. 286 (1898), that view is not evidence).

Wharton's Crim. Law, 9th Ed., Vol. 3, sec. 707 (quoted from in dissenting opinion of Mr. Justice Clarke, in *Valdez* v. *United States,* 244 U. S. 432, 453 (1917).

Encyc. Pl. & Pr., Vol. 22, p. 1059 (also quoted from in opinion of Mr. Justice Clarke).

1 Zoline Crim. Law & Proc., p. 254 (contains following: "It is to be hoped that *nisi prius* judges, out of an abundance of precaution because of regard for the rights of the accused, will never undertake the inspection of premises without the personal presence of the accused.")

II Bishop, Crim. Proc. (2d Ed.) (1913), sec. 965, 3, *View Contra.*

3 Wigmore Ev. (2d Ed.) (1923), s. 1803.

APPENDIX B.

Does the view by the jury in a capital case relate to mere method of procedure or is it a fundamental feature of a jury trial? An answer to this inquiry requires a determination of what use knowledge acquired by a jury on a view is to be put to upon the issue of guilt or innocence.

The general rule is to the effect that knowledge obtained by a jury at a view is to be considered as evidence in the case and to be given due weight in reaching a conclusion.

> "Any other rule is incapable of practical application."
>
> *Wall* v. *U. S. Mining Co.* 232 Fed. 613, 616 (1905).

> "The view of the place was itself evidence."
>
> *People* v. *Palmer,* 43 Hun. (N. Y.) 397, 401 (1887).

> "To say the jury cannot receive evidence by simply viewing the scene is to insult common sense. The most convincing evidence is made by the sense of sight."
>
> *Foster* v. *State,* 70 Miss. 755, 766 (1893).

Whatever may be held elsewhere, in Massachusetts there seems to be no doubt but that knowledge ascertained by a jury in either civil or criminal cases is evidence.

Tully v. *Fitchburg RR.,* 134 Mass. 499, 503 (1883).

Hanks v. *B. & A. RR.,* 147 Mass. 495, 499 (1888).

> "What they see is evidence in the case."
>
> Oliver Wendell Holmes, J., in *Smith* v. *Morse,* 148 Mass. 407, 410 (1889).
>
> See remark of Holmes, C. J., to same effect in *Com.* v. *Chance,* 174 Mass. 245, 247 (1899) (a capital case.)

In a capital case, it was also held

"There was no error in the statement of the judge as to the right of the jury to consider as evidence what was seen by them on the view."

Commonwealth v. *Mercier,* 257 Mass. 353, 365 (1926).

Commonwealth v. *Mara,* 257 Mass. 198, 209 (1926).

Commonwealth v. *Handren,* 261 Mass. 294, 297 (1927).

"The things thus seen by jurors could not well be banished from their minds. A view often dispenses with the necessity of detailed description by plan or word of mouth. Inevitably that which the jury see on a view will be utilized in reaching a verdict. In that sense that which is disclosed on a view is evidence * * * In another more strict and narrow sense, a view may be thought not to be evidence. Plainly it is not testimony. It is not given by witnesses. It is not offered in the presence of the judge presiding at the trial." Rugg, C. J.

Commonwealth v. *Dascalakis,* 246 Mass. 12, 29 (1923).

Whatever questions may be raised in an academic discussion of the subject, none of these questions are pertinent in the instant case. The judge was actually present at the view and officiated as judge and not as a by-stander. He formally controlled and directed proceedings, made statements of facts and agreements of counsel which were taken down stenographically as part of the trial. In the charge, the jury were given the full use of the knowledge they acquire at the view to the same extent as other evidence in the case. There were no qualifications or reservations whatsoever as to the use of knowledge acquired at the view.

APPENDIX C.

There are judicial expressions in some cases that a view by a jury is not the taking of evidence nor a part of the trial.

People v. *Thorn*, 156 N. Y., 286 (1898).
State v. *Slorah*, 118 Me. 203 (1919).
State v. *Mortensen*, 26 Utah, 312 (1903).
State v. *Ah Lee*, 8 Oregon, 214 (1880).
Com. v. *Dascalakis*, 246 Mass. 12, 28-31 (1923).
Valdez v. *U. S.*, 244 U. S. 432 (1916).
Com. v. *Belenski*, 276 Mass. 35 (1931).

In each case the point was raised for the first time after verdict and the defendant either expressly waived the right to be personally present or made no request to be permitted to go.

In some instances the view was taken at the request of and for the benefit of the defendant.

The *Valdez case* was a trial before a single justice without jury, so that the fundamental question connected with jury trial was not directly involved. In that case there was no request made by or for the defendant to be personally present, and this court added "and we think practically that Valdez's presence was waived." The Chief Justice, and Mr. Justice Clarke dissented. Mr. Justice Clarke, in the dissenting opinion stressed the application of the principle of *Diaz* v. *United States*, 223 U. S. 442, 455. (See also *Hopt* v. *Utah*, 110 U. S., 574, 578, 579; *Lewis* v. *United States*, 146 U. S. 370, 374.)

In *State* v. *Slorah*, 118 Maine 203 (1919) the defendant was permitted to be personally present at the view. Just as the jury was about to enter the house, the defendant created a scene, crying out in the present of the jury, "My God! take me away from here or I shall be insane again." His counsel suggested to the officer in charge of the jury that the defendant be taken into a nearby house which was done, and the jury proceeded with the view in the absence of the prisoner but in the presence of his counsel. The issue here was disposed of on the ground of waiver. The

case as a whole is of assistance to Petitioner in that the court observes that the Massachusetts courts have gone beyond other tribunals in holding a view to be the taking of evidence, and also because of the significant statement on page 215.

> "Whatever his rights are to attend, if he demands it, and we think it should not be denied him in a capital case, he may in all cases waive them and the view properly proceed in his absence."

The decision in *State* v. *Ah Lee*, 8 Ore. 214 (1880), went off on the ground of waiver. It appears that when the motion was made for the view by the district attorney, counsel for the accused stated that they were about to make the same motion. There was no request for the defendant to be present. The court said (page 217):

> "The appellant, if he desired to be present at the view, should have then made an application for that purpose. *If he had desired to see the place where the homicide took place, in order to be better prepared to make his defense, doubtless the court would have permitted him to have accompanied the jury in the custody of an officer*, but failing to make known any desire to be present, he must be deemed to have waived any privilege which he had in this respect."

In *State* v. *Mortensen*, 26 Utah 312 (1903), the issue decided also involved waiver, since the prisoner was not refused an opportunity to be present. The general principal of the existence of the right to be present where seasonably claimed, seems to be recognized by the statement of the court (p. 340).

> "* * * *although we doubt not that in every such case the prisoner should be afforded, as he was in this instance, an opportunity to be present at the view, if such be his desire.*"

The court states that under a construction of the statutes of Utah the view is not a taking of evidence because the

judge was not required to be present and that nothing can be a part of the trial that takes place outside the court.

The court, somewhat illogically, also compares the presence of a defendant at a view with that of presence at the jury's deliberation at the conclusion of the case.

The case most strongly relied upon is *People* v. *Thorn*, 156 N. Y. 286 (1898), *supra*, which regards a view as an inspection merely "to enable the jurors to more accurately understand and more fully appreciate the testimony of witnesses given before them" (p. 298).

> "If, as is contended, the view of the premises by the jurors is a part of the trial *or is the taking of testimony upon the trial*, it may be that the view could not take place in the absence of the defendant; but we are not prepared to concede that the view is a part of the trial or is the taking of evidence" (p. 296).

From an examination of both the majority opinion and the single point discussed in the dissenting opinion, it would seem quite evident that the majority intended principally to lay a basis for its final conclusions that the right was one that could be waived and for no other purpose.

The court, however, deemed it necessary to add, on page 299:

> "If the defendant and his counsel and the district attorney wish to accompany the jury, we think it but reasonable that they should be permitted to do so."

The language and reasoning of the majority opinion that a view is not evidence has been criticized in an excellent note in 12 Harvard Law Review 211 (1898).

Furthermore, carrying the no courtroom, no trial, and therefore no prejudice theory, advanced in the Thorn case, to its logical conclusion would permit actual prejudice of a fundamental character resulting in a conviction to be brushed aside because of a technicality over which the defendant can have no control or direction. That reasoning entirely subordinates to the outward habiliments of a trial the essential human element which is the directing force

and which produces the intended result. It may be that this distinction is wholly due to a strict interpretation of a New York statute minutely regulating sessions of court.

The discussions in both the *Thorn case, supra,* and in *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 28-31, emphasize the absence of the trial judge, and state that his presence and participation at a proceeding are essential to make it part of a trial.

All the above-cited cases (except, perhaps, *Commonwealth* v. *Dascalakis, supra*) are predicated upon the theory that the use of knowledge acquired at the view is not evidence in the case.

No case, however, can be found, other than the recent case of *Commonwealth* v. *Belenski,* 276 Mass. 35 (1931), in which the same trial judge as in the instant case, refused to permit a similar request of accused in a capital case to attend a view. There the Supreme Judicial Court of Massachusetts overruled the exception wholly upon the prior decision of that court in *Commonwealth* v. *Dascalakis.* In the *Belenski case* the point of the presence and conduct of the trial judge at the view was not called specifically to the attention of the court, or argued—beyond a mere statement of the claim—nor was the point discussed on the basis of either general or constitutional law.

Actualities in the instant case render these judicial expressions inapplicable to Petitioner because

1. *Judge was present and officiating.*
2. *Jury were directed to use view as evidence to convict.*
3. *There was no waiver by Petitioner or his counsel.*

APPENDIX 1 TO PETITION.

Stenographic Report of Trial.

I, A. C. Webber, counsel appointed by the court to represent defendant Herman Snyder, do hereby certify that the within pages of the "Transcript of the Evidence" (See Mass. St. 1926, Chapter 329), certified to by Frederick C. Bean, Assistant Clerk of the Superior Court of Middlesex County, is the only part of said Transcript material to the matter of view; and that a copy thereof will be served upon the Attorney General of the Commonwealth of Massachusetts, representing the respondent, together with copies of the Brief.

A. C. WEBBER,
Counsel Appointed by Court for Herman Snyder.

Subscribed and sworn to, before me.

WILLIAM J. MCCARTY,
Notary Public. (Seal.)

Dated at Boston, Mass., August 2, 1933.

Mr. VOLPE: I think it would be of considerable assistance to the jury if we took a view at this time.

The site of this murder is not very far away and I doubt if it will take us more than half an hour.

I would like to make a simple opening to the jury at this time and reserve the right to make a formal opening on their return.

The COURT: Counsel step to the bench.

(Bench conference, at which the following occurred:)

The COURT: Do you want to make any remarks, either of you, before the view is taken? If you do, let me know.

Mr. WEBBER: The District Attorney's opening will do for all of us.

The COURT: If there is anything you want pointed out?

Mr. WEBBER: I will do it there.

The COURT: You will have the opportunity if you want to.

Preliminary Opening on Behalf of the Commonwealth for the purpose of a View, by Frank G. Volpe, Esq., Assistant District Attorney.

May it please your Honor, Mr. Foreman and gentlemen of the jury: You are probably aware at this time that we are going to consider a murder case, and in order that you may understand the evidence as it goes in we are going to take you down here on the Northern Artery, on Somerville Avenue, where this murder took place on April 9, 1931.

There you will see a gasoline station operated by the Cities Service Refining Company. The building sets back from the avenue, with the usual entrances in and out, and certain points will be pointed out to you, for instance, the entrance and the window as you go in, and the tanks, the location of the different articles in that particular station.

From there we are going to take you a short distance over the bridge—perhaps you are familiar with the Northern Artery—and will call your attention to that bridge that you go over, and down where the red and green lights are, and a little beyond, on the left-hand side, two side streets will be called to your attention.

Then you will be brought back here and at that time I will have an opportunity to make a more formal opening and give you the facts and details that the Government expects to prove in this case.

The COURT: Anything that you care to comment on, gentlemen?

Mr. MCDONNELL: Nothing, your Honor.

The COURT: If the officers will make the proper arrangements.

Mr. MCDONNELL: On behalf of the defendant Donnellon, I have not had the opportunity to view the situation.

The COURT: I will appoint you to go on the view as representing Mr. Donnellon, and Mr. Webber likewise.

Mr. MCDONNELL: I am going to request that Donnellon be permitted to view the scene with the jurors.

The COURT: Motions of that sort should be made in writing and in the absence of the jury. Please remember the rule.

The jury may go to the jury room. Wait till the officers qualify.

(Six jury officers were sworn for the purpose of a view.)

The COURT: Do you want to present the written motion?

Mr. McDONNELL: As I understand, as a matter of right the defendant goes and, in order not to go, must waive that right.

The COURT: No, that is not the rule.

Mr. WEBBER: I wish to make a similar request. I object to any view unless my client is present.

The COURT: That has been passed on by the Supreme Court. If you have any motion that you care to rely on that motion should be in writing.

Mr. WEBBER: I will make that motion and raise a Federal question. Under the Constitution of the United States and under our State Constitution no evidence can be offered against anybody in a capital crime, in his absence.

The COURT: That has been passed upon.

Mr. WEBBER: Then I wish to see the client's rights preserved.

The COURT: If you think that is obligatory upon your part as counsel to file that motion, proceed to file it. I can refer you to several cases if you care to have them.

Mr. WEBBER: I will make this motion.

Mr. McDONNELL: The only reason that this is raised, as I understand, a witness who is a defendant has viewed this place and pointed out certain things. In order for my client to understand and to see the things so that he can either disclaim or rebut the evidence presented against him, I want him in my presence to point out the things.

The COURT: Your point is that you want an opportunity with your client, to go there and examine it?

Mr. McDONNELL: Yes, your Honor.

The COURT: I am not sure but that can be arranged.

Mr. McDONNELL: I do not care whether it is done in the presence of the jury. In the Rocco case I know in the discretion of the judge he permitted them to go to the scene of the murder and point out certain things to their counsel.

The COURT: With the jury?

Mr. McDONNELL: With the jury.

The COURT: In the exercise of such discretion as lies within my power, I do not believe here it would be for the best interest of anyone to have the defendants go.

On the other hand, I will consider the question as to whether or not an opportunity will be given you, if after

going there you cannot understand the situation, to go there with your client alone, under proper supervision, provided, of course, that no comment is made by yourself in advance that any such thing would happen or any intimation given to the press. I will consider that and see what you decide after you go to the scene this morning.

Mr. McDonnell: That is all right. That is my only interest.

The Court: The motion that is filed here now is:

> "Now comes the defendant John A. Donnellon and moves that he be permitted to view the scene of the alleged crime."

You do not include in that "with the jury"?

Mr. McDonnell: That does not include "with the jury".

The Court: Your motion that your client be permitted to accompany the jury on the view and the exception that you took——

Mr. McDonnell: I did not take any exception, your Honor.

The Court: This simply applies to a view at some time?

Mr. McDonnell: Yes, your Honor.

The Court: I will take that up.

Mr. McDonnell: That is as your Honor views it, I believe.

The Court: This motion is simply a request that he be permitted to view the scene of the alleged crime with you?

Mr. McDonnell: Yes, your Honor.

The Court: It does not say "with counsel." You better add in there with—your name—with yourself, as counsel.

(Mr. Webber, in behalf of defendant Snyder, presented a written motion.)

(The motion presented by Mr. Webber was read by the Court.)

The Court: As I understand, Mr. Webber's request is directed to attending the view with the jury, but you, (Mr. McDonnell), want an opportunity to have your client go to the scene with you?

Mr. Webber: My request is particularly for my client, Snyder, to be there with the jury, to see what they see. I

take it that what the jury sees on a view is evidence and that is evidence against my client.

The COURT: If that is your motion, in such discretion as is within my power, that motion on the part of the defendant Snyder, to go with the jury on the view, is denied.

Mr. WEBBER: Defendant Snyder excepts.

The COURT: That exception is noted.

Exception No. 9.

I will delay any decision upon the motion of Mr. McDonnell until after he has been to the scene of the murder himself. That, as I understand, is satisfactory to Mr. McDonnell.

Are we ready for the view?

Mr. WEBBER: Yes, your Honor.

The COURT: Recess.

(At 10:53 a. m. the Court and jury retired for the purpose of a view.)

(The jury were taken to a view, alighting from the bus on Somerville Avenue, Somerville, in front of the filling station No. 202 of the Cities Service Refining Company, where the following occurred:)

The COURT: Now, Mr. Volpe, if you are ready.

Mr. VOLPE: Just first stand here, gentlemen, and take a look inside of the gasoline station. Now step in, please.

(The following occurred inside the filling station:)

Mr. VOLPE: Now, gentlemen, I call your attention to this glass here (indicating), this window (indicating the back window of the filling station,) about the position of the glass, and I ask you to look at that, and the relative position of the entrance, especially to the right or to the left, coming in through the door. And then this oil tank here on the right of this window; the other two windows on the right of the building, and I want you to take note of the size of the room, and this telephone here, and these two doors, one on each side of the telephone. Take note, also, of the location of this other gas tank over here, back of the door; this desk on the left. Also look out the window

at the back, and notice the gravel in the yard, and the fence there.

That's all in here.

Mr. WEBBER: I would like to call your attention to the view from the inside, looking out; the expanse of the glass in the door, and the opening in the floor, the condition of the floor.

The COURT: Anything here, Mr. McDonnell?

Mr. MCDONNELL: No, there isn't anything I desire to call attention to.

The COURT: Have you finished here, Mr. Webber?

Mr. WEBBER: Yes, your Honor.

Mr. VOLPE: And notice this partition in line with the door as you come in.

The COURT: All right.

(The jury were again taken to the outside of the building.)

Mr. VOLPE: I want you to take a view of the other side of the sidewalk from this location, and note the driveway on the right of the gas station, and on the left, and these two pumps, or three pumps, noticing the distance from the pumps on the entrance of the gas station.

Now, I would like to have you come over here and take a look at the gas station as it sits back there.

(The jury were taken across the street to the opposite sidewalk.)

Mr. VOLPE: I want you to get a look at the whole layout, the righthand entrance and the lefthand entrance over there, where that car is standing. Take particular notice of the width of this street, and, as you stand here, notice the bridge going towards Union Square, with the right and left driveways.

The COURT: Anything, Mr. Webber?

Mr. WEBBER: Yes, your Honor. I would like to have the jury notice the nature of the travel, and the nearness of the station to the street; also its width, and the opportunity of anybody passing by to look into the station and see what was taking place, if anything.

The COURT: Anything, Mr. McDonnell?

Mr. MCDONNELL: Nothing, your Honor.

Mr. VOLPE: That's all here, then. I want to take them up here a little ways, not very far.

The COURT: In the bus?

Mr. VOLPE: In the bus, yes.

(The jury returned to the bus, alighting at a location opposite No. 250 Somerville Avenue.)

Mr. VOLPE: Now, gentlemen, I ask you to look down that street over there. It is agreed that that is Allen Street. I am then going to take you down there to look at the next street. While you are here, I want you to notice the street up there where the lights appear.

Mr. WEBBER: It is agreed that that is Prospect Street, your Honor.

Mr. VOLPE: Yes, leading to Central Square.

The COURT: Anything here, Mr. Webber?

Mr. WEBBER: While we were at the gasoline station we didn't notice the lights, and I would like to call attention to some of them.

The COURT: Well, we can stop there on the way back.

Mr. WEBBER: The time was between seven and eight o'clock.

The COURT: We can check this when you go back. There is nothing here, Mr. Webber?

Mr. WEBBER: Nothing here.

Mr. VOLPE: I want to call attention to the street down there that runs parallel with Allen Street. That is Linden Street. Can I show that there is a street connecting those two?

Mr. WEBBER: If you say so, I will agree it is so.

Mr. VOLPE: That is a southbound street, connecting Allen Street with Linden Street, running parallel with this street we are on. So that (indicating) is Allen Street, and that (indicating) is Prospect Street up here, running at right angles to this street.

The COURT: Anything here, Mr. Webber?

Mr. WEBBER: No.

The COURT: Have you completed your view now?

Mr. VOLPE: Yes, your Honor.

The COURT: You say you would like to look at the lights down at the filling station?

Mr. WEBBER: Look at the lights.

The COURT: You want the jury to stop there?

Mr. WEBBER: The three of us can look it over, and then we can agree on it.

The COURT: You can have the jury stop there, if you want to.

Mr. WEBBER: If it won't be too much trouble.

Mr. VOLPE: You mean the lights in the gas station?

Mr. WEBBER: I mean outside.

The COURT: You can stop there, if you want to have the jury stop. We will have them do it.

Mr. WEBBER: I will go out first and look, and then, if I want something, I will tell your Honor.

The COURT: Yes. If you want us to get out and look, we will have them do so.

(The jury entered the bus and were taken to a point opposite the filling station, where the following occurred, not in the presence or hearing of the jury:)

Mr. VOLPE: That middle pump wasn't there at the time.

The COURT: It is agreed that the only pumps that were there were the two outside pumps, and that the middle, or blue one, was not there.

Mr. VOLPE: Yes, your Honor.

The COURT: I can state that to them.

(The jury left the bus and assembled on the sidewalk.)

The COURT: Now, it is agreed that at the time of the offense,—that is, on April 9, 1931,—there were but two pumps in front of the gasoline station, the one on the extreme right, that is painted green, and the one on the extreme left, that is painted black. Those two were there. The one in the middle, with the blue striping on it, was not there. It is also suggested that the jurors look at the street lights from that corner down there (indicating), and the situation of those lights and those down the street.

Mr. WEBBER: So far as the middle pump is concerned, we are accepting Mr. Volpe's statement. We have no knowledge, but if he says so, there is no doubt of that.

I ask that attention be called to the two lights at the right of the station, the street light down there, and those up there (indicating).

The COURT: There is one at the corner.

Mr. WEBBER: Yes.

The COURT: The light on the corner, and one on each side of the street, those two there, and that light over there (indicating), and the light above.

Mr. WEBBER: And the lowness of this fenec opposite the filling station, so far as it tends to obstruct the light.

The COURT: All right.

(The jury re-entered the bus and returned to the Court House.)

"Now, what have you before you on which to form your judgment and to render your finding and verdict? The view, the testimony given by the witnesses, and the exhibits, comprise the evidence in this case, comprise the evidence that is before you."

"As I say, it is for the jury to say, from all the evidence before you, taking into consideration what it is contended outside of the evidence that you have relative to the firing of any shot—the conduct of any of the parties just before and just after, and any appearances or any evidence that you may gather from the appearance of the locality itself, the testimony relative to the result of the shot, the course of it, and what was done. All that is a part of the surrounding evidence and the circumstances that you shall take into consideration. And then, having taken all the surrounding circumstances into consideration, it is for you to say from all the evidence before you, whether or not it was a withdrawal. If you find that an attempt was made to withdraw, whether or not it was a genuine withdrawal or whether it as a precipitous flight to escape detection, of course that contention cannot be considered if you find that Snyder was the one that actually fired the shot that killed Kiley.

"If you find that defendant Snyder did not fire the shot which killed the decedent, there is a material variance between the specifications and the proof, and the defendant cannot be convicted of murder in the first degree, with deliberately premeditated malice aforethought."

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

SUPERIOR COURT.

In testimony that the foregoing pages are true copies of excerpts from the original transcript of the evidence, in the capital case of *Commonwealth* v. *Herman Snyder et al.*, I hereunder set my hand and affix the seal of the Superior Court for the County of Middlesex, this twenty-seventh day of July, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL.]

FREDERICK C. BEAN,
Assistant Clerk.

No. 241, October Term, 1933.

Re

HERMAN SNYDER, *Petitioner,*

vs.

COMMONWEALTH OF MASSACHUSETTS, *Respondent.*

APPENDIX 5 TO PETITION FOR CERTIORARI.

I, A. C. Webber, counsel appointed by the Superior Court of Middlesex County to defend the Petitioner Snyder, certify that the matter contained in the subjoined pages constitutes a true record of the procedure in relation to view by jury in the capital cases in Massachusetts therein referred to. The historical references, and italics added to the texts are mine.

The sources of my information are as follows:

Printed accounts of trials published by the Commonwealth of Massachusetts and in the office of the Attorney General of the Commonwealth.

Stenographic Transcripts of Evidence in murder trials in the office of the Clerk of the Supreme Court of Massachusetts.

Stenographic reports of trials in the files of the District Attorney for the Suffolk District.

Stenographic reports of murder trials in the files of the Social Law Library, Suffolk County Court House, Pemberton Square, Boston.

In the Sacco-Vanzetti case, the authoritative account of the trial published by Henry Holt & Co., New York, 1928.

A. C. WEBBER.

The Commonwealth of Massachusetts, the respondent in the above entitled case, does hereby agree that the foregoing may be added to the Record in the case, as Appendix 5 to the Petition.

JOSEPH E. WARNER,
Attorney General,
By GEO. B. LAURIE,
Asst. Atty. Gen.

List of Capital Cases.

Reference is made to citations where the case came before the Supreme Judicial Court.

1892, Commonwealth v. Lizzie Borden, Bristol, before Chief Justice Mason and Justices Blodgett and Dewey.

1894, Commonwealth v. Daniel M. Robertson (162 Mass. 90) Bristol, before Chief Justice Mason and Justices Dunbar and Sheldon.

1899, Commonwealth v. John O'Neil (169 Mass. 394) Franklin, before Chief Justice Mason and Justices Sheldon and Fessenden.

—— Commonwealth v. John McManus, Suffolk, before Mr. Justice Lilley.

1899, Commonwealth v. John H. Chance and Arthur Hagan (174 Mass. 245) Suffolk, before Justices Bishop and Stevens.

1901, Commonwealth v. Charles R. Eastman, Middlesex, before Justices Gaskell and Aiken.

1902, Commonwealth v. Joseph Wilfred Blondin, Suffolk, before Justices Braley and Stevens.

1904, Commonwealth v. Charles L. Tucker (189 Mass. 457) Middlesex, before Justices Sherman and Sheldon.

1904, Commonwealth v. Angles Snell (189 Mass. 12) Bristol, before Justices Aiken and Schofield.

1909, Commonwealth v. Napoleon J. Rivet (205 Mass. 404), Middlesex (Lowell), before Justices Harris and Hitchcock.

1909, Commonwealth v. Chester Jordan (207 Mass. 259) Middlesex, before Justice Stevens.

1909, Commonwealth v. Spiropulous and Mantir (208 Mass. 71) Middlesex, before Justices Fox and White.

1910, Commonwealth v. Elizabeth Richmond (207 Mass. 240) Middlesex, before Justices Crosby and Dana.

1910, Commonwealth v. Hattie La Blanc, Middlesex, before Mr. Justice Daniel W. Bond.

1910, Commonwealth v. Silas N. Phelps (209 Mass. 396) Franklin, before Mr. Justice Schofield.

1916, Commonwealth v. Oscar F. Russ (232 Mass. 58) Suffolk, before Mr. Justice Sisk.

1921, Commonwealth v. Sacco and Vanzetti (255 Mass.

369; 259 Mass. 128; 261 Mass. 12) Norfolk, before Mr. Justice Thayer.

1922, Commonwealth v. Dascalakis (243 Mass. 519; 246 Mass. 12) Suffolk, before Mr. Justice Keating.

1925, Commonwealth v. Celestino Madeiros (255 Mass. 304) Norfolk, before Mr. Justice Lummus.

1925, Commonwealth v. Devereaux, Heinlein and McLaughlin (256 Mass. 387; 256 Mass, 391) Middlesex, before Mr. Justice Fosdick.

1926, Commonwealth v. Jerry Gedzium (259 Mass. 453; 261 Mass. 299) Middlesex, before Mr. Justice Lourie.

1928, Commonwealth v. Frederick H. Knowlton, Jr. (265 Mass. 382) Middlesex, before Mr. Justice Gray.

1930, Commonwealth v. Cerro and Gallo (275 Mass. 320) Suffolk, before Mr. Justice W. A. Burns.

Lizzie Borden Trial.

During the trial the following took place, on the question of view (see pages 96-97 Stenographic Report):

"Mr. Knowlton (District Attorney, afterward Attorney General): At our own desire and also at the desire of the learned counsel for the defence, who are as anxious as we are that everything connected with this tragedy should be seen by the jury, I now move that the jury be directed to take the view of not only the interior, but exterior of the house, and of such other points as to which there will be testimony, as counsel may be able to agree that the jury shall see.

Mr. Robinson (former Governor): I would say on behalf of the defendant this has been a subject of conference, and we cheerfully join in it. We should have made the same request of the Court, if the government had not made it. *I would suggest that while, of course, the defendant is entitled to accompany the jury, she does not desire to go,* and does not really feel able to take this excursion this afternoon for that purpose, and we waive all her rights, (I say this in her presence and with her consent), to any participation in the view.

Mason, C. J.: *The Court in ordering the view desire it distinctly understood that if the defendant desires to be*

present at the view, she may be permitted to be present. She will not be required to be, if she does not desire to be.

Mr. ROBINSON. I have made her fully informed of the situation, and that is her wish.

(The officers were then sworn to accompany the jury upon the view. It was agreed that Mr. Moody (afterward Justice of the Supreme Court of the United States) on behalf of the Commonwealth, and Mr. Jennings on behalf of the defendant, should accompany the jury.)"

TRIAL OF DANIEL M. ROBERTSON

The following took place on the question of view:

"Mr. KNOWLTON (Attorney General): May it please the Court, both the counsel for the defense and for the Commonwealth think that while it is not indispensable, it would be to the advantage of the jurors to see the house in which the homicide was committed. Some of the furniture is probably differently arranged, but the house itself, and the arrangement of the rooms, and the yard, and the outer doors are substantially as they were at the time of the occurrences as to which evidence will be introduced. I am authorized to say that the counsel for the defense join in this request, and I think it would be for the advantage of the jurors and the speed of the trial. My learned associate thinks it would be a better time to take that view before the general opening of the case; that he could make his opening more intelligently and perhaps more briefly. We will take your Honor's judgment about that.

MASON, C. J. (after conferring with the other members of the Court): The Court sees no objection to taking a view at this time, if that is desired, and would like to ask the counsel for the defense if they desire that the prisoner should be present at the view.

Mr. BARNEY: No, we do not desire it. Counsel see no occasion for that. I do not know whether the prisoner should be consulted or not.

Mr. KNOWLTON: Whether it is not his right.

Mr. BARNEY: I suppose it is his right.

Mr. KNOWLTON: Better have it formally waived.

Mr. BARNEY (after consulting prisoner): I think not.. I do not understand the defendant's counsel are making any objection to this; the defendant does not."

(Pages 15 and 16 of the stenographic record.)

(The remarks of Chief Justice Mason are to be read in connection with his views later expressed in the trials of O'Neil and McManus following.)

JOHN O'NEIL TRIAL.

(See page 8 of Printed Report of Trial.)

"MASON, C. J.: If convenient arrangements can be made so that it will not be a hardship for the jury, the Court will be inclined to grant the view. I distinctly understand that it is not to be complicated with any request for the defendant to accompany the jury on the view."

JOHN MCMANUS TRIAL.

The following took place on the question of view:

"Mr. SCHOFIELD (afterward Justice of Superior Court and later U. S. District Court): In this case, may it please your Honors, after the opening, we would like to suggest, in fact make a motion to the Court, that the jury be permitted to take a view of these premises. I understand, the Attorney General has just informed me, he will make no objection to that motion, and I think it will assist in understanding the case. Some things about the locality there will undoubtedly be important as to the statements. The place is on Hudson Street, not far,—94 Hudson Street.

The ATTORNEY GENERAL: I don't know that I ever oppose a view in a criminal case, if your Honors please; I don't know. * * * Do I understand, Mr. Schofield, that you desire—it might make some difference to my opposition whether you desire—the defendant to go to this view or not?

Mr. SCHOFIELD: Well, *I suppose the defendant in a case of this kind has a right to go on the view, if there is one.*

MASON, C. J.: *Will it be asked?*

Mr. SCHOFIELD: *It will not be asked.*

MASON, C. J.: *It would have a bearing upon the discussion, of course, in ordering a view, as to what degree of inconvenience it would involve.*

Mr. SCHOFIELD: The request will not be made, I will inform the Court, that the defendant may exercise his right of accompanying the jury if a view is granted.

MASON, C. J.: What say?

Mr. SCHOFIELD: The request will not be made that the defendant may exercise his right to go with the jury. He will waive it, if a view is granted. * * *"

TRIAL OF CHANCE AND HAGAN.

"BISHOP, J.: The Court takes the view that the motion should be granted, the view not to include such parts of the streets as do not appear to be important, including the drug store and station and such other places as the Court says that it will be useful for the jury to see. *The Court is of the opinion that if a view is taken it is the right of the prisoners to be present at the view, unless they waive that right.* Do the prisoners desire to be present?

Mr. GEORGE R. SWASEY: The defendant, Hagan, your Honor, refuses to be present at any view ordered by the Court.

BISHOP, J.: How is it in regard to the defendant Chance?

Mr. HARRIMAN: If the defendant Hagan is not going, we will waive it in behalf of the defendant Chance." * * * * * * "Mr. SWASEY: I wish to further state, if your Honors please, that if the defendant Hagan is taken over the view by any officer of the Court it will be against his objection.

BISHOP, J.: *It is at his option.*

Mr. SWASEY: *I have stated that he refuses to go.*

BISHOP, J.: Yes.

Mr. SWASEY: And if taken over any portion of this territory or any place under the direction of the Court, it will be subject to his exception.

BISHOP, J.: He will not be. * * *"

* * * "Mr. KNOWLTON (Attorney General Hosea M. Knowlton): The Commonwealth has no objection.

BISHOP, J.: And no objection to the route?

Mr. KNOWLTON: No, sir. As I said before, we expect to offer no evidence that Mr. Hagan went over that route, or

connect him in any way with that route. We do expect to show that Chance took that route, and if Chance wants to see that route I do not see why he ought not to.

BISHOP, J.: The Court will retire and consider the matter more carefully."

* * * "The Court came in at 3.20 o'clock and Bishop, J. made the following announcement:

The Court has considered this matter and makes this decision: While the Court has the power to order a view and while it appears by the statements of counsel that a view in this case would principally affect the prisoner Chance, yet, *as we cannot say that it will not affect the defendant Hagan, the Court does not consider it expedient to order a view against his objection and refusal to be present at the view.* * * *"

TRIAL OF CHARLES R. EASTMAN.

(See page 46 of Stenographic report.)

"GASKILL, J.: The view may be taken and the Government may proceed to make such opening as it deems important to aid the jury in their view.

Mr. KNOWLTON (Atty. General): May I be pardoned in asking if my friends desire to have the defendant go on the view, or will they waive his rights, if he has any?

Mr. CHAS. W. BARTLETT: As far as the defendants attending the view we will waive that privilege and go without the defendant. I hardly see how he can aid us particularly.

GASKILL, J.: *If the defendant will formally waive his right to go he may do so now.*

The PRISONER: I waive that privilege."

JOSEPH WILFRED BLONDIN TRIAL.

After the opening for the Commonwealth the following occurred (See page 136 of stenographic record):

"BRALEY, J. (afterward Justice of the Supreme Judicial Court): We think that if the jury are to take a view, it is better that they should do so before the introduction of any evidence. The view may include Chelmsford as well as the location on Green Street in the City of Boston as well as

any other place in the City of Boston to which you desire to call the attention of the jury.

Does the defendant waive *his personal right* to accompany the jury?

Mr. MORRISON: He does, your Honor.

BRALEY, J.: *Then he must do so in open court and a record made of it.*

Mr. MORRISON: Yes, your Honor, I will see that he does so.

BRALEY, J.: *If you will see that he does so now.*

The PRISONER: Yes.

BRALEY, J.: You waive *your right* to accompany the jury on the view which has been asked for in your behalf by your counsel?

The PRISONER: Yes, sir."

* * * * * * *

Justice Braley "had a genius for the exacting requirements of a trial judge of the first order."

* * * * * * *

TRIAL OF CHARLES L. TUCKER.

"Mr. VAHEY: If your Honor please, it is agreed by the counsel for the Commonwealth and the counsel for the defendant that a view of the premises and the territory which are to be the subject of much testimony in the case, would be of very material assistance to the jury in understanding the evidence; and therefore, in behalf of the defendant, and with the consent of the counsel for the Commonwealth, I move that the jury take a view of such objects and places as may be pointed out by the counsel for the Commonwealth and counsel for the defendant, respectively, under the direction of the Court. I will have the defendant exercise his right, if he so desires.

The DEFENDANT: I request that the jury take a view of the place, and I do not desire to be present.

Mr. VAHEY: *The defendant waives his right to be present.*"

Note: There is no reference to the view in the charge, "You are to decide the case, gentlemen, upon the evidence

given in open court by the witnesses who testified before you" (See p. 1539).

TRIAL OF ANGLES SNELL.

The following took place before the Court on the question of view (see pages 66-7):

"AIKEN, J.: I think this is the proper time to bring up the subject of the view. Counsel on both sides have spoken to the court in an informal way and the district attorney in his opening assumed that a view would be taken, which he was justified in doing. I presume a view is desired?

Mr. DUBUQUE (Afterward Justice of the Superior Court): Yes, sir; it is desired by the defense.

Mr. PARKER (Attorney General): And by the Commonwealth.

AIKEN, J.: If a view is to be granted *it is important that the defendant should waive any right to be present at the view, and I will inquire of him if he so waives, or you may speak to him, Mr. Dubuque, if you have not done so. The could will not decide upon the matter until that matter is decided.* Snell, do you waive any rights to be present at the view the jury will take tomorrow?

The PRISONER: I would like, your Honor, very much, if it is my right, to go to the view with the others. *I waive my rights.*

AIKEN, J: *You waive your rights?*

The PRISONER: Yes, sir.

AIKEN, J.: Very well; *if you waive your rights the view will be granted* and Mr. Dubuque, the court makes this by way of suggestion, that if there is anything that you would like to call to the attention of the jury you may make a partial opening at this time and make a full opening later on. The limitations of the view might restrict you in what you might wish to say, and if so I will suggest to you that you may say it by way of partial opening at this time."

TRIAL OF NAPOLEON J. RIVET.

(See Transcript of Evidence, Vol. I, page 53, following conference between Court and Counsel for defendant at the bench).

"Mr. BENT: The clerk may make an entry on the record that the defendant waives his right to accompany the jury on the view.

The CLERK: Will he state so?

Mr. BENT: He cannot state so in English.

The CLERK: He can say enough to say yes or no.

(To Prisoner:) Rivet, the jury under the direction of the Court and at your request are about to take a view of the premises. *Do you waive your right to go with that jury to see the premises?*

The PRISONER: *I do.*"

TRIAL OF CHESTER JORDAN.

(At page 83 of Stenographic Record.)

"Upon a conference between Court and counsel, it was agreed that a view of the premises should be taken.

"STEVENS, J.: *Let the prisoner waive any right he may have to be present.*

Mr. CHARLES W. BARTLETT: Very good; I will speak to him about that. (After conference with associates) I suppose that had better be waived by him standing up and waiving it. Mr. Sullivan, you have him stand up.

STEVENS, J. (to Clerk): *Ask him if he waives his right to be present.*

The CLERK: Chester S. Jordan, it is arranged that a view of the premises in question shall be taken by the jury. Do you waive your right to attend—do you request that and waive your right to attend?

The PRISONER: I do.

STEVENS, J.: *Let a record of that be made by the stenographer.*"

TRIAL OF PETER DELOREY AND JAMES MANTIR.

(At page 81 of Stenographic Report.)

"FOX, J.: *Will the defendants waive their right to go on the view?*

Mr. WINSLOW: They will have to, I suppose.

FOX, J.: *Peter Delorey, do you waive the right to go on the view?*

Defendant DELOREY: *I do waive the right.*

FOX, J.: *James Mantir, do you waive the right to go on the view?*

Defendant MANTIR: I do."

TRIAL OF ELIZABETH RICHMOND.

The following occurred after the view had been taken (Page 707):

"CROSBY, J.: *The prisoner should have been allowed to proceed with the jury on the view if she had so desired.* By an omission—by an oversight, no mention was made of that fact. *Is that now waived by the prisoner?*

Mr. GLOAG: If your Honor please, I have consulted with her and she is willing to waive our not having been present.

CROSBY, J.: *I will ask the prisoner—do you waive the fact that you were not present with the jury when they took a view?*

The PRISONER: I do, yes."

TRIAL OF HATTIE LA BLANC.

In discussion on view no mention was made by either side of defendant's rights. Court on its own motion on p. 58 of stenographic report says:

"The COURT: *Now in some way the defendant should waive the right to go on the view.* I should not like to have her go, because it is not essential she should go.

Mr. JOHNSON: The defendant is ready to waive the view. I will have her do it personally, if your Honor desires.

The COURT: I guess you had better.

The CLERK: *Hattie La Blanc, do you waive the right to go upon the view in this trial?*

The PRISONER: *Yes.*

The COURT: "Now, Mr. Foreman and gentlemen, I want to say to you in reference to the view that you do not go out in this locality to look about for the sake of getting evidence in the case. All the evidence you get is introduced here at the trial. * * *

(Page 59) The theory of the view is this, that after you have seen it and seen the locality, it is thought that you will

be better able to understand the testimony which refers to the locality that you would if you hadn't seen it."

TRIAL OF SILAS N. PHELPS.

(Pages 70 and 71, Transcript of Evidence.)

"Mr. DAVENPORT: I wish to make a motion for a view (The defendant presented to the Court a motion for a view.) (Discussion at the Bench.)

The COURT: In regard to this motion, what does the District Attorney say?

IRWIN, D. A.: I do not desire to oppose the motion.

The COURT: Then I understand a view will take practically all the day.

IRWIN, D. A.: Yes, sir.

The prisoner waived his right to go on the view personally.

The COURT: * * * I think the oath administered to the jury is the best instruction. I shall grant the motion for a view. * * *"

TRIAL OF OSCAR F. RUSS.

(At pages 31-33 of Transcript.)

After statement by the District Attorney that both sides desire a view, and a motion for a view, following instructions to the jury in regard to the view follows:

(Page 33.)

"Mr. MURRAY: The defendant *waives the right* to accompany the jury on the view."

SACCO-VANZETTI TRIAL.

(References are to printed transcript of the record of the trial of the Sacco-Vanzetti Case, published by Henry Holt & Co., N. Y. (1928), in five volumes).

(Vol. I, Page 48.)

"The COURT: Will there be a motion at any time to take a view?

Mr. KATZMANN: Yes, your Honor, on the part of the Commonwealth.

The COURT: Now, will you see to it that a proper waiver is signed by both defendants? *As a general rule of law they are entitled to be present.* While the court has passed upon

it, yet I always prefer in the cases tried before me to have a waiver signed in person by the defendants.

Mr. J. McANARNEY: We will see that is done."

* * * * * * *

(Page 49.)

Mr. KATZMANN: The Commonwealth moves, if your Honor please, that the jury, accompanied by the officers and counsel designated by the Court, take a view of the scene of the crime and of such other places and vicinities as may to either side seem material and helpful to the jury. It is believed, on the part of the Commonwealth, that such a view will be of great and material assistance to the jury in understanding the evidence later to be introduced.

The COURT: Mr. McAnarney, what do you say?

Mr. J. McANARNEY: We are agreeable and would like the view, also.

The COURT: Mr. Moore?

Mr. MOORE: Yes, your Honor.

The COURT: *Have the defendants signed a waiver of being present at the time of the view?* I like that simply for the record of the case.

Mr. J. McANARNEY: *They have, if your Honor please,* and I leave the waiver with the clerk." (Handing waiver to the clerk.)

* * * * * * *

(Vol. II, Page 1816.)

Mr. J. McANARNEY: If your Honor, please, we are ready to take that view.

The COURT: *Have the defendants waived formally in writing as I suggested they should?*

Mr. J. McANARNEY: Yes, they have, if your Honor, please. (Handing paper to Court.)

The COURT: *Let it be filed. You just put your initials on there,* Mr. McKenney. (The stenographer initials the paper.)

The COURT: Do you desire to be heard, Mr. Katzmann, upon a motion to take a view of the Boda automobile, so called?

Mr. KATZMANN: No, your Honor.

The COURT: This will be admitted simply,—the view will be taken the same as in the case of the Buick automobile, so that the jury may use the view for the purpose of giving application to the evidence they have heard upon the witness stand. Are you ready to go on the view now?

Mr. J. McANARNEY: Yes, if your Honor please. (View of Boda Overland car is then taken.)

The COURT: You may go, gentlemen. Let the officers come forward, please. Pay attention once more, please, to the oath. (The oath is administered to the officers by the Clerk.)

The COURT: Do you think it desirable that the Court should go with you?

Mr. J. McANARNEY: Pardon?

The COURT: Do you think it desirable that the Court should go with you in taking the view?

Mr. J. McANARNEY: We would like very much to have your Honor do so.

The COURT: I will do that."

* * * * * * *

(Vol. III, Page 3155.)

Mr. J. McANARNEY: If your Honor, please, we are ready to take that view.

The COURT: *Have the defendants waived formally in writing as I suggested they should?*

Mr. J. McANARNEY: Yes, they have, if your Honor please. (Handing paper to Court.)

The COURT: *Let it be filed. You just put your initials on there,* Mr. McKinney. (The stenographer initials the paper.)

The COURT: Do you desire to be heard, Mr. Katzmann, upon a motion to take a view of the Boda automobile, so called?

MR. KATZMANN: No, your Honor.

The COURT: This will be admitted simply—the view will be taken the same as in the case of the Buick automobile, *so that the jury may use the view for the purpose of giving application to the evidence that they have heard upon the witness stand.* Are you ready to go on the view now?

Mr. J. McANARNEY: Yes, if your Honor please. (View of Boda Overland car was then taken.)"

DASCALAKIS TRIAL.

See pages 17-18 of this brief for waiver of Counsel at the trial, and testimony given at the hearing on the motion for new trial.

TRIAL OF CELESTINO MADEIROS

The following entry appears on the docket of the case in the Superior Court:

May 12, 1925. Commonwealth moves that view be taken. *Defendant by counsel acquiesces* and *personally waives his right* to accompany jury on view. Motion for view granted and view taken.

TRIAL OF DEVEREAUX, HEINLEIN AND MCLAUGHLIN.

(Known as Carbarn Case.)

"DISTRICT ATTORNEY: (Page 42) Mr. Reading * * * I now formally move that the jury take a view of the premises.

THE COURT: I take it that there is no opposition to the motion.

Mr. HIGGINS: (Counsel for Devereaux) I have no objection.

THE COURT: It is allowed. I understand Mr. Sheriff that the defendants wish to go with the jury on the view. Now, can you make arrangements for them? They do not have to go in the same cars with the jurors.

Mr. TIERNEY: *The defendant, Bennett, your Honor, waives the right to go.*

Mr. GOLDMAN: *If you Honor, please, the defendant King waives the right to go.*

The COURT: *Then I take it the defendants, Heinlein, Devereaux, and McLaughlin wish to go with the jury on the view?*

Mr. HOAR (for defendant McLaughlin): They so state to their counsel, your Honor."

TRIAL OF JERRY GEDZIUM.

(At Pages 22-32.)

"The COURT: All right. Now, Mr. Weeks, does the defendant waive *his right* to go on the view?

Mr. WEEKS: The defendant waives *his right,* your Honor.

Mr. READING (District Attorney): *I would suggest that counsel not having the right to do it for him, that the defendant do it himself.*

The COURT: *Mr. Gedzium, do you desire to make a statement?*

The DEFENDANT: *I waive the right,* your Honor, to go on the view.

The COURT: Very well."

TRIAL OF FREDERICK H. KNOWLTON, JR.

(At Page 16 of Transcript.)

"The COURT: A view having been asked for and allowed by the Court, it will now be taken. The defendant, I understand, waives *his right* to be present at the view.

Mr. DRISCOLL: Yes, your Honor.

The COURT: *Perhaps you had better have him do it himself.*

(The defendant waives his right to be present at the view.)"

TRIAL OF CERO & GALLO.

(At page 13 of Transcript.)

"Mr. SHEENAN (Assistant District Attorney): I might make this suggestion to your Honor. When we take a view—they are highly technical in some of these murder cases usually, the defendant himself—they just follow the custom and the *defendant himself waives, rather than counsel, his right to go on the view.* I do not know whether you want both defendants to waive this or not.

Mr. GARO (Counsel for Gallo): Why not wait until we come to that.

The COURT: That is a matter to come up after the jury is impanelled, and if a view is to be taken * * * "

(At page 49 of Transcript.)

The COURT: *I understand that the defendants waive their rights to accompany the jury on the view.*

Mr. GARO: Yes.

Mr. BICKFORD: Yes. * * *

The COURT: * * * *Do I understand both defendants waive their right to accompany the jury on the view?*

Mr. GARO: *Gallo does.*

Mr. BICKFORD: *Cero does.*"

(4081)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 241

HERMAN SNYDER, PETITIONER,

vs.

COMMONWEALTH OF MASSACHUSETTS.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE PETITIONER.

A. C. WEBBER,
H. P. FIELDING,
L. H. WEINSTEIN,
Counsel for Petitioner.

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ON WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE PETITIONER.

I.

Statement of Facts.

Petitioner is a citizen of the United States. He was twenty-one years of age at the time of the trial in May, 1932. He was indicted, tried, convicted and sentenced to death in the Superior Court for the County of Middlesex of the Commonwealth of Massachusetts, upon an indictment charging petitioner and two others (Donnellan and Garrick) with the capital crime of murder in the first degree. After arraignment, the court appointed counsel to defend petitioner. After the trial had begun, and the impanelling of the jury had been completed, the assistant district attorney moved

for a view by the jury of the filling station and the locality, the scene of the alleged crime. This filling station was a short distance from the court and within the county and judicial district of the court. It was brought to the attention of the court at the hearing of the motion for view that the assistant district attorney had recently taken a co-defendant (Garrick) who was not to be tried, but was to be used as a Government witness, to the scene and had gone over the case with him there. Petitioner objected to any view by the jury unless he was present, and claimed constitutional protection. Petitioner thereupon filed a written motion insisting upon his right, guaranteed by State and Federal constitutions, to be personally present at the view. Petitioner further based his motion—"that it is necessary to acquaint his counsel with facts necessary to his defense." The motion also referred to the taking of Garrick to the scene by the assistant district attorney, already alluded to. The court denied that the petitioner had a right to be personally present at the view, refused to permit the petitioner to be personally present at the view, denied his written motion—to all of which petitioner took an exception. A view was then had by the jury without the personal presence of the petitioner, and his counsel was obliged to attend without the benefit of such assistance as petitioner could give if he were personally present. The trial justice was present with the jury at the view, so were the court officers, the court stenographer, and counsel appointed on both sides to attend. At the view the trial justice formally directed and controlled the proceedings. The trial justice at the view stated to the jury agreements of counsel as to facts and changes in the scene that had occurred since the shooting. What occurred at the view was taken down stenographically and appears in the transcript of the evidence as any other part of the trial (see Appendix 1 to petition). In the charge

to the jury the trial judge directed without reservation, in accordance with adjudicated cases in Massachusetts, that full use of what was observed by the jury at the view could be used by the jury as evidence in the case upon the issue whether petitioner had committed the crime of murder in the first degree (see Appendix 1 to petition). Petitioner had been held in custody without bail since his arrest in April, 1932. The jury were not permitted to separate during the trial until after verdict.

Federal question was specially set up and claimed and brought to the attention of the court at every stage—orally and by written motion at the time of the view—in the brief filed on behalf of petitioner in the Supreme Judicial Court of Massachusetts—and by oral argument in said court. Federal question is discussed in the opinion of the court (see Record, page 30, point 4).

ARGUMENT

I.

When Mr. Justice Hammond at the trial of the petitioner refused to permit him to be present at the view of the scene of the alleged crime, the justice virtually excluded the petitioner from being present when evidence was taken by the jury upon which the petitioner could be convicted of a capital offense. The action of the justice was a denial of the benefit of due process of law within the meaning of the XIV Amendment.

Powell v. *Alabama*, 287 U. S. 45 (1932).

It is subtle reasoning to draw a distinction between testimony of witnesses sworn in and testifying in the court room, from all other means of evidence that may be used in

the trial of a capital case to reach a conviction. To justify the proposition that the right of personal presence of the accused in a capital case only applies to testimony of witnesses is contrary to reason and to all human instincts of justice Yet, authority which it is claimed supports the course followed by the trial court must rest upon logic which permits a trial **to be suspended** to take evidence.

See authorities collected and discussed in Appendix C. to Brief filed in support of petition.

The position that the encroachment of constitutional rights of the petitioner must occur within the limit of the trial court room is likewise untenable, particularly in view of what actually took place at the trial of the petitioner.

At the view by the jury, the trial justice was present in his official capacity as judge, so also in their official spheres were the court officers and the court stenographer, and all counsel in the case. The trial justice formally directed and controlled proceedings. He stated to the jury agreements of counsel as to facts and changes in the scene that had taken place since the shooting; and in fact, conducted himself as he would on the bench. What took place was taken down stenographically as other parts of the trial and in the same manner that testimony was taken at the trial, all of which appears in the transcript of the evidence now before this tribunal. As to the practical effect of what the jury saw and heard at the view, no distinction was made between knowledge thus acquired, or by means of other evidence introduced in the course of the trial. Thus the jury were authorized to use such knowledge to bring in a conviction of first degree murder and it must be assumed that the jury did so. Thus the jury were told by the presiding judge in his charge:

"Now, what have you before you on which to form your judgment and to render your finding and verdict? THE VIEW, the testimony given by the witnesses, and the exhibits comprise the evidence that is before you." (Page 966 of the Transcript of the Evidence. Capitalization of words is that of counsel.)

"As I say, it is for the jury to say from all the evidence before you taking into consideration what it is contended outside of the evidence that you have relative to the firing of any shot—the conduct of any of the parties just before and just after, AND ANY APPEARANCES OR ANY EVIDENCE THAT YOU MAY GATHER FROM THE APPEARANCE OF THE LOCALITY ITSELF, [see footnote 1] the testimony relative to the result of the shot, the course of it, and what was done." [See footnote 2.] (Pages 972, 973, Transcript of the Evidence. Capitalization is that of counsel.)

Footnote 1. At the view, the jury could notice the smallness of the interior of the gas station; the way and direction of the swinging of the door; how far it projected into the room when open; its close proximity to other parts of the room; how far a person trying to get around the door could shoot so as to produce the wound on Kiley's left chest according to where he stood when he was shot; the position of the oil racks upon which the ejected empty shell was found; and where the oil racks were at the time of the shooting; the location of the window in which a hole caused by the bullet was discovered to determine the direction of the bullet; the position of the telephone booth from which the deceased suddenly emerged; and other conditions, were all important and the only corroborative assistance available to petitioner. This knowledge so obtainable by the jury at the view could be more easily understood and grasped by the average mind, than any detailed description by plan or word of mouth. The petitioner was held without bail under a capital charge, and was absolutely helpless to defend himself or to assist his counsel. He was also prevented by the excluding action of the trial justice from being able to refresh his memory as to appearances at the station on the fatal night where he had been but a few moments under abnormal conditions. Moreover, changes in the scene had taken place thereafter and before the jury arrived. Of these changes the defendant has not even now the knowledge, but the changes were pointed out by the judge to the jury at the suggestion of the prosecuting attorney.

Footnote 2. Because of specifications filed by the Commonwealth, it became of importance in the proof whether Donnellan or Snyder actually fired the shot, and the trial justice ruled to the jury that if the evidence did not prove that Snyder fired the shot, there was a variance between the specifications and the proof and that Snyder could not be convicted of murder in the first degree with deliberately premeditated malice aforethought. (See p. 973 of Transcript of Evidence.)

II.

The fundamental right and importance of personal presence of the accused at a criminal trial, particularly in capital cases, has been stressed by judicial expression whenever occasion has arisen.

This Court has said:

In *Lewis* v. *United States*, 146 U. S. 370, 372 (1892):

> "A leading principle that pervades the entire law of criminal proceedings is, that after indictment found, nothing shall be done in the absence of the prisoner."

And in *Hopt* v. *Utah*, 110 U. S. 574, 578, 579 (1884):

> "*His* (the prisoner's) *life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and the court and triers.* The necessity of the defense may not be met by the presence of his counsel only."

In *Schwab* v. *Bergren*, 143 U. S. 444, 448 (1892):

> "The personal presence of the accused from the beginning to the end of a trial for felony, involving life or liberty, as well as the time final judgment is rendered against him, may be and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with."

The principle has its roots in the early history of the common law.

See *Rex* v. *Ladsingham*, Sir T. Raymond Reports, 193 (1682).

In 1 Cooley, *Constitutional Limitations* (8th ed.) (1927), p. 667, the author states:

"In cases of felony, when the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment."

See 1 Bishop, *New Crim. Proc.* (2d ed.) (1913), sec. 273.

In *French* v. *State*, ~~84~~ 85 Wis. 400, 411 (1893), the court said:

"These great common law requirements have been made constitutional provisions in the various states, and so made essential and paramount, and also indispensable in trials for capital offenses and felonies. It is not too strict to hold that in all such cases the accused must be present in court to meet the witnesses face to face * * * These are great constitutional safeguards against oppression and injustice that must not be abridged or compromised."

See also *Maurer* v. *State*, 43 N. Y. 1 (1870).
1 *Zoline Federal Crim. Law & Procedure*, 254.

The protection of the Massachusetts Declaration of Rights, Article 12, and General Laws of Massachusetts, Chapter 278, section 6, are but declaratory of the common law and is found generally in all State constitutions.

Com. v. *McCarthy*, ~~165~~ 163 Mass. 458, and cases cited.
Com. v. *Cody*, 165 Mass. 133.
Hooker v. *Com.*, 13 Grat. 763, 766.

Such rights do not relate to matters merely procedural even though they may be the subject of waiver. Nor are the merits of the case involved when paramount substantial rights are invaded.

Com. v. *Harris*, ~~213~~ 231 Mass. 584 (1919).
Lebowich, Ptr., v. *Com.*, 235 Mass. 357 (1920).
Powell v. *Alabama*, *supra*, at page 3.
See Parker, C. J., in *Com.* v. *Parker*, 2 Pick. 550, 551 (1824).
Com. v. *Knapp*, 9 Pick. 496, 515, 516 (1830).

The right of personal presence comes within the pale of "an immutable principle of justice which is the inalienable possession of every citizen of a free government."

Twining v. *New Jersey,* 211 U. S. 78, 113.

"* * * and which no member of the Union may disregard."

Holden v. *Vardy,* 169 U. S. 366, 389.

The serious handicap of a prisoner charged with a capital offense in the conduct of his defense and in assisting counsel, by reason of the custody and restraint incident to a capital case, has been judicially noticed in the leading case of *Diaz* v. *United States,* 223 U. S. 442, 455.

All the fundamental safeguards of the criminal law against oppression and injustice rest upon broad grounds of fair play. They are not to be narrowed by technical interpretation, or to be sacrificed or made to yield to mere temporary expediency, or more expeditious processes of trying cases.

Moore v. *Dempsey,* 261 U. S. 86.
Cooke v. *United States,* 267 U. S. 517.
Tunney v. *Ohio,* 273 U. S. 510.
Lebowitch, Ptr., v. *Com.,* 235 Mass. 357 (1920).
Powell v. *Alabama, supra.*

III.

Due process comprehends a fair and just hearing and a full and adequate opportunity for defense.

Powell v. *Alabama, supra.*

Such protection, to be more than meaningless pretense, must assure an accused whose life is imperilled by judicial process, to **see through his own eyes, hear through his own ears,** and to **act through his own powers of reasoning,** not infrequently his best means of establishing innocence. No

one can be substituted to exercise these faculties for him, against his will, when he chooses to personally exercise this acknowledged prerogative.

> "* * * to be fully heard in his defense **by himself**, or his counsel, **at his election.**"
>
> *Massachusetts Declaration of Rights, Article* 12.

Massachusetts statutes have never interfered with the fundamental right of a defendant in a criminal case to be present at view. General Laws, Chapter 278, Section 6, provides that "A person indicted for a felony shall not be tried unless he is personally present at the trial." And the only statute relating to view in a criminal case was passed in 1836, and in the simplest language thus: "The Court may order a view by a jury impanelled to try a criminal case."

Rev. Stat. 1836, Chap. 137, sec. 10.

See also sec. 9 (Sec. 10 is now General Laws, Ter. Ed., Chap. 234, sec. 35; and sec. 9 is Chap. 278, sec. 6).

No limitation upon the legislative power of Massachusetts is sought to be imposed in this case. It is not conceded, however, that such limitation upon State action does not exist under the Fourteenth Amendment.

See remark of Mr. Justice Moody in *Twining* v. *New Jersey, supra,* at p. 99.

The relief sought by the petitioner, therefore, does not conflict with the principles of *Hurtado* v. *California,* 110 U. S. 516, and *Maxwell* v. *Dow,* 176 U. S. 581, and *Holden* v. *Hardy,* 160 U. S. 366, and *Twining* v. *New Jersey,* 211 U. S. 78, 111, and cases there collected.

Even in rate hearings, involving property rights and not life and liberty, the right to a full hearing is within the

protection of the due process clause of the Fourteenth Amendment.

> "Manifestly there is no hearing when the party does not know what evidence is offered or considered."
>
> *Int. Com. Comm.* v. *L. & N. R. Co.*, 227 U. S. 88, 93.

> "Nothing can be treated as evidence, **which is not introduced as such.**"
>
> *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288.

If what the jury saw at the view was evidence, and the accused was excluded from personally knowing what was being done to convict him, he was denied the right to a full hearing. If nothing can be treated as evidence which is not introduced as such, the introduction of evidence at the view, in the absence of and against the specific objection of the accused, was likewise a denial of due process.

IV.

On behalf of petitioner it is not conceded that the "actual practice (referring to whether Massachusetts practice requires the presence of the accused at view) **as disclosed by highly important capital trials has been that the whole subject has been treated as a function of the court."**

> See Statement of Chief Justice Rugg in *Commonwealth* v. *Dascalakis*, 246 Mass. 12 at 30.

Surely, no statute in Massachusetts requires exclusion of defendant from the view.

> *G. L.* (*ter ed.*) Chapter 234, Sec. 35.
>
> (See Rev. St. of Mass. (1836) Chap. 137, ss. 9 and 10.)

The earlier Massachusetts cases before the enactment of the statute permitting a view in criminal cases pointed out the apparent violation of "an important principle, that all the proceedings should be in the presence of the accused."

Parker, C. J. in *Com.* v. *Parker,* 2 Pick. 550, 551 (1824).

See *Com.* v. *Knapp,* 9 Pick. 496, 515, 516 (1830).

See also 3 *Wharton's Crim. Law* (9th Ed.), sec. 707, quoted in dissenting opinion in *Valdez* v. *U. S.,* 244 U. S. 432, 453.

The practice in numerous important capital cases set forth in Appendix 5 to Petition for Writ in this case is susceptible of an opposite interpretation of Massachusetts practice, if the language of the most noted judges and distinguished jurists in Massachusetts history is to be given its accepted meaning.

The language of an eminent judge, the late Justice John W. Hammond of Massachusetts, may be borrowed for this occasion:

> **"For more than a generation this view * * * has been adopted in the courts of this State, and men whose rights to life hinged upon its accuracy have been tried, convicted and sent to death."**
>
> *Com.* v. *Tucker,* 189 Mass. 457, 495.

That case is important, however, as indicating the extent to which actual practice in jury trials in capital cases controls and guides the determination of legal principles by courts of last resort.

The petitioner in his brief filed in the court below brought to the attention of that court the matters now urged, and again, in a motion for rehearing. (See Record, page 40.)

V.

To argue that a view is not evidence under Massachusetts decisions is futile.

See:

Com. v. *Chance,* 174 Mass. 245, 247 (1899).
Com. v. *Dascalakis,* 246 Mass. 12, 30.
Tully v. *Fitchburg RR.,* 134 Mass. 499 503 (1883).
Hanks v. *B. & O. RR.,* 147 Mass. 495, 499 (1888).
Smith v. *Morse,* 148 Mass. 407, 410 (1889).
Com. v. *Mercier,* 257 Mass. 353, 365 (1926).
Com. v. *Mara,* 257 Mass. 198, 209 (1926).
Com. v. *Handren,* 261 Mass. 294, 297.
Wall v. *United States Mining Co.,* 232 Fed. 613, 616 (1905).
People v. *Palmer,* 43 Hun. (N. Y.), 397, 401 (1887).

To hold otherwise "is to insult common sense. The most convincing evidence is made by the sense of sight."

Foster v. *State,* 70 Miss. 755, 766 (1893).
See 12 *Harvard Law Review,* 212.
See Appendix B to Brief filed in Support of Petition.

VI.

The proposition that a view by the jury in a capital case of the scene of the alleged crime is a part of the trial is forcibly supported by authority and reason.

See Compilation of decisions by States, and also Authorities collected in Appendix A to Brief of Petitioner in Support of Petition.

Of the authorities that seem to hold to the contrary, all are cases where the point was raised for the first time after verdict and where the right was expressly or impliedly

waived with the exception of the two recent instances of *Com.* v. *Belenski,* 276 Mass. 36 (1931), and *Com.* v. *Snyder* (Petitioner); Massachusetts cases.

Valdez v. *United States,* 244 U. S. 432 (1916), was a trial before a single justice without jury, so that the fundamental principles connected with jury trial were not directly involved. *At any rate, the case was one of waiver.* The Chief Justice and Mr. Justice Clarke dissented. The dissenting opinion of Mr. Justice Clarke states that the application of the principle of *Diaz* v. *United States,* 223 U. S. 442, demands a different result.

So also *People* v. *Thorn,* 156 N. Y. 286 (1898), proceeded upon the theory of waiver, and the dictum often relied upon in support of the proposition that view is not part of a trial is not followed in the practical administration of the trials in murder cases in New York. *But it is to be noted that the absence of the trial justice at the view is emphasized in the majority opinion.*

> See excerpts from Proceedings in Records of Appeals in Court of General Sessions, New York County, in case of *People* v. *Lytton* (1931), reported in 257 N. Y. 310; and in *People* v. *Weiner,* (1927) reported in 248 N. Y. 118, both capital cases. (Appendix 1 to *this* Brief.)

If, according to the dictum in *People* v. *Thorn,* errors in the observing of administrative formalities of court room procedure can be availed of by the prosecution where substantial rights are invaded, an instrument of oppression is placed within the reach of the prosecution. Defendants are usually uninformed upon such matters to take advantage thereof.

Other cases claimed to follow *People* v. *Thorn,* and which are collected in Appendix C to Petitioner's Brief in Sup-

port of Petition for Certiorari, upon analysis do not support the judicial expression against right of personal presence. *All are cases of express or implied waiver.*

Counsel for petitioner have been unable to discover a single instance in the judicial history of the entire country (other than the recent instances in Com. of Massachusetts v. Belenksi and that of Com. v. Snyder, Petitioner) where the accused in a capital case was denied the right to be present at a view when the request was seasonably made and not waived.

VII.

There was a denial of effective aid in the preparation and trial of a capital case.

See *Powell* v. *Alabama, supra,* at p. 71.

In the written motion presented to the trial court in behalf of petitioner insisting upon his right to be personally present with the jury at the view, it was also insisted that his personal presence was necessary **"to acquaint his counsel with facts necessary to his defense."** It is no answer to excluding the petitioner from being present at the view, that he *might have been* allowed to visit the scene of the alleged crime at some subsequent stage of the trial without the jury. This is intimated in the opinion in *Commonwealth* v. *Snyder,* the instant case (see Record, p. 31), but the colloquy quoted in the opinion refers solely to a remark addressed to counsel for co-defendant Donnellan and does not purport to include all that was said at the hearing on the view. Reference is particularly made to remarks of counsel for Snyder—**"I object to any view unless my client is present."** And again, "My request is particularly for my client, Snyder, to be there with the jury, to see what they see. I take it that what the jury sees on a view

is evidence and that is evidence against my client" (see Appendix 1 to petition, pages 35, 36 and 37).

To yield to the suggestion that there was sufficient protection by the offer of the trial court, would mean translating a fundamental right into a matter of judicial discretion. The most important use to the defendant of his presence there was when the jury was at the scene—to see what they saw—to observe what the Government considered important—to point out to his counsel what he regarded as essential to his defense to be used then or thereafter in the course of the trial. If the accused did not at the outset insist on his rights, the principle of waiver would have deprived him of the right forever. He was not obliged to speculate upon the mere hope that the trial court *who had once refused* might at some later time change his mind.

VIII.

There was also a denial of equal protection of the law as well as the due process clause of the XIV Amendment. There was a denial of equal protection because the accused charged with a capital offense and in custody without bail had no control over his presence or absence. The order of the court under these circumstances withheld from him the right afforded defendants on bail, or admitted to bail, who are manifestly free to accompany the jury at a view. An order excluding a defendant in these last-mentioned cases would be strongly suggestive of error. **This was the practical effect of the order in the instant case.**

The due process and the equal protection clauses of the XIV Amendment are customarily considered together: "It may be that they overlap, that a violation of one may cover at times the violation of the other, but the spheres of the protection they offer are not conterminous."

Truax v. *Corrigan*, 257 U. S. 312, 331-332 (1921).

Conclusion.

There was manifest error in denying petitioner rights guaranteed him by the Constitution of the United States, and he is entitled to a new trial.

Respectfully submitted,

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APPENDIX 1.

(1927.)

PEOPLE

v.

WEINER.

Record of Appeal from Court of General Sessions, New York County.

THE COURT: (Francis X. Mancuso, J.) I understand the inspection of the Tower by the jury is consented to by both the District Attorney and counsel for the defendant, Mr. Elder.

MR. BROTHERS: Yes, I suggested it and he consents to it.

THE COURT: Do you waive the presence of the defendants or do you want them there?

MR. ELDER: Yes.

THE COURT: Do you want them there?

MR. ELDER: We do not need the defendants. If we should need them, we can send for them, but I do not think we need them.

MR. ELDER: I get your point.

THE COURT: We are not going there for the purpose of taking testimony. They are going there to see the place, that is taking testimony.

THE COURT: I mean taking testimony in the form of witnesses.

MR. BROTHERS: Orally.

MR. ELDER: If a juror should ask a question, it might be that Mr. Brothers and I could agree upon an answer then we both——

THE COURT: In that event you would want the defendant there.

MR. ELDER: Oh, no, when we get back we can stipulate it on the record.

THE COURT: All right.

MR. ELDER: (Continuing) In the presence of the defendants. That would correct any irregularity.

THE COURT: I just want the record clear about all these points——

(1931.)

PEOPLE

v.

LYTTON.

Record on Appeal from Court of General Sessions, New York County.

THE COURT: (Otto A. Rosalsky, J.) Well, counsel will continue his examination upon our return.

In my judgment a view of the premises is necessary.

Now, Mr. Shulman, under authority of *People* v. *Thorne*, 156 N. Y. the Court of Appeals has held that a waiver may be made by the defendant that he accompany the jury.

MR. SHULMAN: I will consent to that.

THE COURT: Does he make that waiver himself?

MR. SHULMAN: I will ask him. Do you consent to waive the right——

THE DEFENDANT: Anything Mr. Shulman says is all right.

THE COURT: You consent to waive your right to go with the jury to the premises?

THE DEFENDANT: Yes, sir.

THE COURT: And to other places designated in the order?

THE DEFENDANT: Yes, sir.

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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 241.

HERMAN SNYDER,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

BRIEF IN REPLY TO PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Massachusetts in the case against the petitioner is reported in Massachusetts Advance Sheets (1933), 809 (185 N.E. 376). The date of rescript of the Supreme Judicial Court of Massachusetts is April 6, 1933. The date of sentence to death by electrocution and final judgment of the Supreme Court in and for the County of Middlesex is April 18, 1933.

STATEMENT OF FACTS.

The petitioner was indicted, tried, convicted and sentenced to death, together with one Donnellon, in the Superior Court of the County of Middlesex and Commonwealth of Massachusetts upon an indictment charging the petitioner and two others, Donnellon and Garrick, with the capital crime of murder in the first degree. Garrick was a Government witness, and was not tried. The petitioner, with the two other defendants, on April 9, 1931, while each of them

was armed, set out to commit the crime of robbery. After stealing an automobile they drove to a gasolene station which was in charge of the deceased, one James Kiley. The petitioner Snyder entered the station with Donnellon, while Garrick remained in the car. A shot was fired from a revolver. The deceased died almost immediately after the shot was fired. The petitioner was apprehended about ten months later in Philadelphia. He was indicted April 6, 1932. Able counsel was appointed for him on April 12, 1932, thirty-four days before the trial. Counsel before and during trial had at all times access to the petitioner for the purpose of conference and the preparation of defense. All witnesses requested by the petitioner to be summoned were summoned at the expense of the Commonwealth. Under a Massachusetts statute a committee of eminent mental experts examined the petitioner and found him sane. The report of this committee was open alike to the use of the petitioner, the Government and the Court. The petitioner filed a motion for a bill of particulars, item No. 4 of which required the Commonwealth "to specify which particular defendant in fact did actually assault and beat the said James M. Kiley." To this the Commonwealth answered: "The defendant, Herman Snyder, fired the shot from said pistol that killed James M. Kiley." Item No. 5 of the petitioner's motion for a bill of particulars was: "As to the crime itself—the Commonwealth is asked to specify whether the offence alleged was—

"(a) Murder committed with deliberately premeditated malice aforethought.

"(b) Murder committed with extreme atrocity or cruelty.

"(c) Murder committed in the commission of a crime punishable with death or imprisonment for life.

"(d) Murder committed in the attempted commission of a crime punishable with death or imprisonment for life.

"(e) If it is claimed that the murder consisted of murder committed in the commission of a crime, the Commonwealth shall specify what the crime was by reference to any statute defining said crime.

"(f) If it is claimed that the murder was committed in the attempted commission of a crime, the Commonwealth shall specify which crime is referred to, what the attempts consisted of and what acts of this defendant constituted the said attempt."

The answer of the Commonwealth was: "The Commonwealth specifies that this murder was committed with deliberately premeditated malice aforethought, and also murder committed in the attempted commission of a crime punishable by imprisonment for life, to wit: robbery while armed, as defined in Chapter 265, Section 17 of the General Laws. And the Commonwealth further says that the defendant, Herman Snyder, entered said gasolene station and while armed attempted to rob the deceased, and shot and killed the deceased with a thirty-two Automatic Colt pistol."

General Laws, chapter 265, section 17, is as follows:

"Whoever, being armed with a dangerous weapon, assaults another and robs, steals and takes from his person money or other property which may be the subject of larceny, with intent if resisted to kill or maim the person robbed, or, being so armed, wounds or strikes the person robbed, shall be punished by imprisonment in the state prison for life or for any term of years."

The Massachusetts statute defining murder is as follows:

General Laws (Ter. Ed.), chapter 265, section 1:

"Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or

> cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury."

After empanelling of the jury the Commonwealth moved for a view by the jury of the scene of the crime. The petitioner requested that he be allowed to be present at the view with the jury. The Court denied this request; but intimated that, if counsel desired to take the petitioner to the scene without the jury, it could be arranged (see Appendix 1 to Petitioner's Petition, pages 35 to 38). At no time during the trial did the petitioner attempt to avail himself of this offer. The jury was sequestered.

The petitioner set up the following defenses:

1. At the time of the shooting he was insane.
2. At the time of the shooting he was under the influence of liquor.
3. When he entered the premises he intended to commit larceny, and not robbery.
4. That he did not fire the fatal shot.

It required eight full days to try the case, and approximately one-half of this time was consumed by the defense. During the trial the Government produced a detailed and comprehensive plan, drawn to scale, giving the dimensions of buildings and objects as existing upon the locus at the time of the crime. This plan was introduced and admitted in evidence after testimony by a civil engineer, who was subject to the cross-examination of the defense.

Argument.

1. *Due Process of Law did Not Require the Presence of the Petitioner at the View.*

The judicial act of Mr. Justice Hammond in refusing the request of the petitioner to accompany the jury to the scene of the crime when it visited the same for the purpose of viewing it did not deprive the petitioner of the protection of the Fourteenth Amendment to the Constitution. His presence was not necessary to any fundamental conception of due process of law.

Bank of Columbia v. *Okely,* 4 Wheat. 235, 244.
West v. *Louisiana,* 194 U.S. 258, 262.
Allen v. *Georgia,* 166 U.S. 138, 140.
Frank v. *Mangum,* 237 U.S. 309, 326.

The Massachusetts position that there is no violation of a constitutional right of an accused when a view is taken in his absence or in the refusal of a trial judge to permit him to attend a view with a jury is supported by respectable authority and is maintained by many state courts.

Com. v. *Dascalakis,* 246 Mass. 12, 32.
Com. v. *Belenski,* 276 Mass. 35, 40.
State v. *Rogers,* 145 Minn. 303, 309.
State v. *Adams,* 20 Kan. 311, 325.
State v. *Stratton,* 103 Kan. 226.
People v. *Thorn,* 156 N.Y. 286.
State v. *Lee Doon,* 7 Wash. 308, 310.
Shular v. *State,* 105 Ind. 289.
Valdez v. *United States,* 244 U.S. 432.

As to what is meant by the words "law of the land" and their equivalent, "due process of the law," the Supreme Court has said "that they were intended to secure the individual from the arbitrary exercise of the powers of govern-

ment, unrestrained by the established principles of private rights and distributive justice:"

Bank of Columbia v. *Okely,* 4 Wheat. 235, 244.

The Massachusetts practice as disclosed by highly important capital trials has treated the subject of regulating the taking of views as a discretionary function of the Court.

Com. v. *Dascalakis,* 246 Mass. 12, 30, 31.
Com. v. *Webster,* 5 Cush. 295.
Com. v. *Phelps,* 210 Mass. 78, 82.

There is, therefore, no ground, either upon legal principle or upon practical fairness, for holding the presence of the accused himself to be essential. It is a discretionary function of the Court. Ordinarily a Court might grant a defendant's request to be present on a view, but conceivably he might refuse to grant the request for prudence' sake, perhaps because of the danger of escape or of mob violence.

The principle that a view is not a part of a trial and in only a limited sense the taking of evidence is recognized by many courts and text-writers and has been enacted into statute in many states.

It is supported by excellent reasoning.

The chief purpose of a view is to enable the jury to understand better the testimony which has been or may be introduced. Under the practice of taking a view the essential features may be pointed out by the counsel. The oath to the court officers having charge of a jury on a view is to the effect that no one shall be suffered to address the jury. There can be no comment or discussion. The jury can obtain information only through sight. One or two aids, representing both the Commonwealth and the defendant, go on the view; it being permissible for them, in the presence of each other, to point out to the jury marks, matters and things, but not otherwise to speak to the jury. A view often

dispenses with the necessity of a detailed description by plan or word of mouth.

Inevitably that which the jury sees on a view will be utilized in reaching a verdict. In that sense that which is disclosed on a view is evidence. In another more strict and narrow sense a view may be thought not to be evidence. Plainly it is not testimony. It is not given by witnesses. The right of cross-examination is not infringed. The premises themselves are not witnesses. How could the place viewed be cross-examined? What human credit does it have that makes cross-examination necessary? The defendant, if present, could not lawfully ask questions or make statements, and the sole value of his presence would lie in the opportunity to see that nothing irregular was done and to obtain such a knowledge of what was done to assist him in the subsequent conduct of the trial. This opportunity he already fully possesses, for he is represented at the view by his attorney, and this attorney is in a position, not only to observe what is done, but to make all his observations useful later to his client as may be needed.

3 Wigmore, Evidence (2d ed.), 1803.

It may be true, as contended by the petitioner, that this is the first time that the precise point raised by him has been presented to this Court, and that other cases may seem to have turned upon the question of an actual or implied waiver by an accused of the right to be present when the jury took a view.

The respondent contends, however, that the matter complained of is not of sufficient importance to warrant the allowance by this Court of the extraordinary process prayed for. The hopeless conflict of authorities as to the exact nature of a jury view demonstrates that the majority of courts consider the matter one of practice, and not of substance. The question presented involves only a question of

procedure, and no question of substance nor general principle of law.

The petitioner was tried in a commonwealth which assiduously surrounds one accused of capital crime with every safeguard to his legal rights.

The Supreme Court of Massachusetts has stated that there was no violation of the petitioner's rights under the Massachusetts Declaration of Rights.

> *Com.* v. *Snyder*, Mass. Adv. Sheets (1933), 809, 817.

The Federal Supreme Court recently stated that "with any error of the state court involving alleged contravention of the state statutes or constitution we, of course, have nothing to do."

> *Powell* v. *Alabama*, 287 U.S. 45, 52.
> *Rogers* v. *Peck*, 199 U.S. 425, 434.
> *Hebert* v. *Louisiana*, 272 U.S. 312.

The petitioner has cited the Sixth Amendment to the Constitution of the United States.

This amendment, in substance the same as article XII of the Massachusetts Declaration of Rights, is not applicable.

> *West* v. *Louisiana*, 194 U.S. 258, 261.

The Federal Supreme Court has again and again declared that when the highest court of a state has acted within its jurisdiction and in accordance with its construction of a state constitution and laws, very exceptional circumstances will be necessary in order that the Federal Supreme Court will feel justified in saying that there has been a failure of due process of law.

> *Allen* v. *Georgia*, 166 U.S. 138.
> *Frank* v. *Mangum*, 237 U.S. 309.
> *Twining* v. *New Jersey*, 211 U.S. 78.

Hurtado v. *California*, 110 U.S. 516.
Felts v. *Murphy*, 201 U.S. 123, 129.

2. Denial of Effective Assistance of Counsel.

The petitioner was not denied the effective assistance of counsel. This fact is apparent upon the face of the record.

In light of the Massachusetts theory that a view is not part of the trial, a subsequent visit of the petitioner and his counsel to the scene of the crime, as was suggested by the Court, would have been as effective an aid to the petitioner as his visit to the scene with the jury.

The view in this case could but assist the jury in visualizing the plan introduced in evidence which they took to the jury room.

If the petitioner was sincere in his contention that a visit to the scene would assist him in his defense, he would have accepted the suggestion of the Court of visiting the scene with his counsel under circumstances attracting less public attention than a visit with the jury (see Appendix 1 to Petitioner's Petition, pages 35 to 38).

The petitioner in his brief has made frequent references to the case of *Powell* v. *Alabama*. There can be no comparison between the opportunity afforded the defendants in that case and the opportunity afforded the defendants in this case to have effective aid of counsel.

The casual appointment of counsel at the eleventh hour in the Powell case is a marked contrast to the appointment in this case, which was made less than a week after indictment and almost five weeks before trial. The petitioner at all stages was ably represented by counsel learned in the law, who took to the Supreme Court of Massachusetts almost ninety exceptions.

Massachusetts in 1780, in one of the earliest state constitutions, recognized the right of accused to have counsel.

> Massachusetts Constitution, Declaration of Rights, article XII.

In Massachusetts "No person shall be assigned as counsel in a murder case unless he has been a member of the bar for more than ten years."

Superior Court Rules (1932), Rule 95.

3. Denial of Equal Protection of the Laws.

The contention of the petitioner that a defendant who is on bail or admitted to bail would be free to accompany the jury at the view, while the petitioner in the instant case, because it was a capital case, was refused such request, and as a consequence was refused equal protection of the laws, is unfounded. There is no decision holding that a defendant in a case less serious than a capital case is entitled by reason of the lesser gravity of the charge to accompany the jury on a view. There is no practice that upon a charge less serious than a capital charge the accused is free to accompany the jury on the view.

The Massachusetts practice in all cases pertaining to views has been that the matter is entirely discretionary with the Court.

The language of the statute is: "The court may order a view by a jury impanelled to try a criminal case." General Laws (Ter. Ed.), chapter 234, section 35. The matter of granting a view is by statute discretionary, and if a trial Court deems one an aid to the administration of justice, the further exercise of the same discretion permits it to prescribe the manner of its taking and who shall be present thereat.

Com. v. *Chance,* 174 Mass. 245.
Com. v. *Dascalakis;* 246 Mass. 12.
Rigg v. *Boston, R.B. & L. R.R. Co.,* 158 Mass. 309, 311, 313.
Com. v. *Webster,* 5 Cush. 295.
Com. v. *Knapp,* 9 Pick. 495, 515.
Tully v. *Fitchburg R.R. Co.,* 134 Mass. 499, 503.

On the other hand, the facts in this case demonstrate that the petitioner was afforded the fullest protection of the laws by having able assistance of counsel; that as to his sanity he was provided with the services of eminent specialists under what is generally considered one of the most enlightened legislative enactments of recent years. The material portions of this statute are as follows:

> General Laws (Ter. Ed.), chapter 123, section 100A:
>
> "Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. . . . The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the probation officer thereof, the district attorney and to the attorney for the accused."

Conclusion.

It is therefore respectfully submitted that this case is not one calling for the exercise by this Court of its supervisory powers, and that there is nothing in the record to support a contention that any right of the petitioner under the Federal Constitution has been violated in the minutest particular. His trial was full and fair according to the laws and practice of the Commonwealth of Massachusetts, and throughout

it he was accorded due process of law in every particular. He was not deprived of the effective assistance of counsel and he had the equal protection of the laws as existing in a commonwealth priding itself upon its humane attitude toward all accused of capital crimes. Consequently the petition should be dismissed.

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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 241.

HERMAN SNYDER

v.

THE COMMONWEALTH OF MASSACHUSETTS.

RESPONDENT'S BRIEF.

STATEMENT OF FACTS.

The facts surrounding the crime are summarized in the opinion of the Supreme Judicial Court of Massachusetts in the case of *Commonwealth* v. *Snyder*, 1933 Adv. Sh. 809, 810, appearing in the record on pages 25 to 28, inclusive.

The petitioner was indicted for murder on April 6, 1932 (Rec. p. 1). He was arraigned and pleaded not guilty on the same day (Rec. p. 2). On April 12, 1932, counsel was appointed for the defendant by the Court. The trial of the petitioner commenced on or about May 17, 1932, in the Superior Court of Middlesex County. After the impaneling of the jury, the Commonwealth moved that the jury take a view of the scene of the crime. Whether or not there shall be a view by a jury in a criminal case within the Commonwealth of Massachusetts rests within the sound discretion of the presiding justice. The authority to order such a view is contained in G.L. (Ter. Ed.) c. 234, §35, which reads as follows:

> "The court may, upon motion, allow the jury in a civil case to view the premises or place in question or

any property, matter or thing relative to the case if the party making the motion advances an amount sufficient to defray the expenses of the jury and the officers who attend them in taking the view, which shall be taxed as costs, if the party who advanced them prevails. The court may order a view by a jury impanelled to try a criminal case."

The petitioner filed a motion that he be allowed to be present in person at the view with the jury (Rec. p. 11). The Court denied this motion (Rec. p. 11), but intimated that if counsel desired to take the petitioner to the scene without the jury it could be arranged (Appendix 1 to petition). At no time during the trial did the petitioner attempt to avail himself of this offer. Counsel for the petitioner was present with the jury at the time of the taking of the view. The petitioner duly excepted to the refusal of the Court to permit him to attend in person the taking of the view by the jury. This exception was argued at great length and considered in detail by the Full Bench of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Opinion of the Court Below.

The opinion of the Supreme Judicial Court of Massachusetts in the case against the petitioner is reported in Massachusetts Advanced Sheets, 1933, 809; 185 N.E. 376. The portion of the opinion relevant to the issue in this proceeding reads as follows:

"4. The fifth assignment of error rests on exception nine and relates to all proceedings that occurred in relation to the view taken by the jury, the refusal to permit Snyder to be present, the denial of his written motion 'to attend view' and the order and direction to take a view in this defendant's absence, and alleges that this refusal was in violation of the constitutional rights

of the defendant under the Constitution of the United States and the Constitution of Massachusetts which guarantee the right of a defendant in capital cases to be present at all stages of the trial and face his accusers and to be present when testimony is offered against him. The decisions on the question relating to view in criminal cases are in conflict in other States. The cases recognizing the right of the accused to be present when such view is had do so chiefly on the ground that either it is a part of the trial, or, since the jury have the right to treat the information received during the view as evidence, the accused, under the Constitution, has a right to be confronted by the witnesses and therefore must be present. See note to *Noell* v. *Commonwealth* (135 Va. 600), 30 A.L.R. 1345, 1357, where the cases are reviewed; see also note to *People* v. *Thorn* (156 N. Y. 286), 42 L.R.A. 368. At common law, except upon an indictment for criminal nuisances, a view was not allowed in criminal cases 'without mutual consent.' *Commonwealth* v. *Handren,* 261 Mass. 294, 297. In this Commonwealth the judge by Rev. Sts. c. 137, §10, now G.L. (Ter. Ed.) c. 234, §35, was given authority to 'order a view by any jury empanelled to try a criminal case.' It is now settled that a view is not such a taking of evidence as violates the constitutional right of the defendant 'to meet the witnesses against him face to face.' *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 31. 3 Wigmore on Evidence (2d ed.) §1803. It is expressly decided in *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 31, that the defendant in a capital or other criminal case could waive whatever rights he had to accompany a jury on the view, and it was said that 'There are obvious practical objections to the contention that as matter of right a defendant in a criminal case may accompany the jury on a view. The whole subject rests in the sound discretion of the court.' It was decided in *Common-*

wealth v. *Belenski*, 276 Mass. 35, that the refusal in that case to permit the defendant to accompany the jury on a view was within the sound discretion of the trial judge, citing *Commonwealth* v. *Dascalakis*, 246 Mass. 12, 28-31. The defendant Snyder in support of his motion to be present at the view argued the broad ground of legal right to be present at all times during the course of the trial and thereby to acquaint his counsel with the facts thus secured which might be necessary to aid in his defence. The attorney for the defendant Donnellon in support of the motion said: 'In order for my client to understand and to see the things so that he can either disclaim or rebut the evidence presented against him, I want him in my presence to point out the things.' The judge said: 'I am not sure but that can be arranged.' Counsel for Donnellon then said: 'I do not care whether it is done in the presence of the jury.' The judge then decided it would not be for the best interest of any one to have the prisoners go with the jury but stated: 'On the other hand, I will consider the question as to whether or not an opportunity will be given you, if after going there you cannot understand the situation, to go there with your client alone, under proper supervision, provided, of course, that no comment is made by yourself in advance that any such thing would happen or any intimation given to the press. I will consider that and see what you decide after you go to the scene this morning.' After the view the request was not renewed. There is nothing in the record which discloses that the defendants were deprived of effective aid in the preparation and defence of their case that would have been afforded by their presence at the view. We see no error in the trial judge's refusal to grant the motion. The defendant's contention that the refusal to grant the motion is a violation of art. 14 of the Amendments to Constitution of the United

States in that it is a denial of 'effective aid in the preparation and trial of a capital case,' and therefore is a denial of due process of law, citing *Powell* v. *Alabama,* 287 U. S. 45, 52, 57, 58, is unsound, in that the chief purpose of a view is to enable the jury to understand better the testimony which has been or may be introduced, and because the view is not a part of the trial, it being suspended while the view is taken. *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 29-30. See *Commonwealth* v. *Slavski,* 245 Mass. 405, 413."

Issue.

The sole issue involved in this proceeding is whether or not the refusal of the justice presiding at the trial of the petitioner in the Superior Court for the County of Middlesex, Commonwealth of Massachusetts, to permit the petitioner to accompany the jury on a view of the premises where the crime took place constitutes a violation of any rights guaranteed to the petitioner by the Fourteenth Amendment to the Constitution of the United States.

Argument.

The Law of Massachusetts was Settled, Prior to the Petitioner's Case, that a Defendant has no Absolute Right to Accompany the Jury on a View.

The question whether or not a defendant in a criminal action has an absolute right to accompany the jury on a view to the scene of the crime was considered by the Supreme Judicial Court of Massachusetts in two cases decided prior to the arrest and trial of the petitioner. In the case of *Commonwealth* v. *Dascalakis,* 246 Mass. 12, the Court considered this matter fully. In that case both the defendant and the Commonwealth were represented by extremely able counsel. The portion of the decision relevant to the issue involved in these proceedings is as follows:

"The jury took a view of the place where it was alleged that the murder was committed and where the body of the person who was murdered was found. To permit a view was within the discretion of the court. *Commonwealth* v. *Chance*, 174 Mass. 245, 247.

"The defendant did not accompany the jury on the view. The judge well may have believed that the defendant waived his right to go on the view and have discredited the affidavit of the defendant to the contrary. *Commonwealth* v. *Russ*, 232 Mass. 58, 70.

"It is urged that, since it has been held that information gained by a jury on a view may be treated as evidence, *Tully* v. *Fitchburg Railroad*, 134 Mass. 499, *Smith* v. *Morse*, 148 Mass. 407, 410, *McMahon* v. *Lynn & Boston Railroad*, 191 Mass. 295, 299, therefore the defendant must be present at the view. The word 'view' expresses by its own natural signification its present meaning when used with reference to a trial in court. When a jury takes a view it goes to the place where the main event involved in the trial occurred in order that the jurors may inspect the land, the building, the machine or the other crucial thing about which will centre a considerable part of the testimony. Its chief purpose is to enable the jury to understand better the testimony which has or may be introduced. The essential features may be pointed out by the counsel. No witnesses are heard. The oath to the court officers having charge of a jury on a view is to the effect that no one shall be suffered to address the jury. There can be no comment or discussion. The jury can simply use their eyes. They can obtain information only through sight. One or two attorneys representing both the Commonwealth and the defendant go on the view, it being permissible to them, in the presence of each other and of the officers of the court, merely to point out to the jury 'marks, matters, and things,' but not otherwise to speak

to the jury. The things thus seen by the jurors could not well be banished from their minds. A view often dispenses with the necessity of detailed description by plan or word of mouth. Inevitably that which the jury see on a view will be utilized in reaching a verdict. In that sense that which is disclosed on a view is evidence. It is rightly described as such. Expressions to that effect are in numerous decisions. *Tully* v. *Fitchburg Railroad,* 134 Mass. 499. *Smith* v. *Morse,* 148 Mass. 407, 410. *Parks* v. *Boston,* 15 Pick. 198, 209. *McMahon* v. *Lynn & Boston Railroad,* 191 Mass. 295. In another more strict and narrow sense a view may be thought not to be evidence. Plainly it is not testimony. It is not given by witnesses. It is not offered in the presence of the judge presiding at the trial. In general, evidence in a jury trial can be given only in the presence of the judge, whose duty it is to be present and to be the directing mind over whatever goes on. The place of trial is not changed while the view is being taken. The trial is merely suspended. It is a part of the right of trial by jury as established by the law of this Commonwealth that each party is entitled to the assistance and protection of the judge throughout the trial. In this aspect the idea of testimony being presented in the absence of the presiding judge is in conflict with fundamental conceptions of trial by jury. *Whitney* v. *Wellesley & Boston Street Railway,* 197 Mass. 495, 502. *Opinion of the Justices,* 207 Mass. 606. *Posell* v. *Herscovitz,* 237 Mass. 513, 515. Moreover, things seen at a view cannot be witnesses in any accurate definition of that term. That which is disclosed by the organs of vision on a view by a jury is mute and generally inanimate. That in this strict sense the view is not in the same category as that commonly termed evidence is manifest from the fact that the practice is firmly established, in cases where otherwise that course ought to be followed, of

granting motions for new trials even though there has been a view, and of refusal by this court to deal with exceptions on the theory that the jury may have thus acquired material information not disclosed on the record. *Rigg* v. *Boston, Revere Beach & Lynn Railroad,* 158 Mass. 309. *Munroe* v. *Carlisle,* 176 Mass. 199. *Williams* v. *Citizens' Electric Street Railway,* 184 Mass. 437, 438. *Albright* v. *Sherer,* 223 Mass. 39.

"The practice in recent years in capital cases doubtless has been to inquire of the prisoner whether he desires to accompany a jury on the view. But the actual practice as disclosed by highly important capital trials has been that the whole subject has been treated as a function of the court. In *Commonwealth* v. *Webster,* 5 Cush. 295, the jury were sent on a view without any expression of desire on the part of the defendant and against the objection of his counsel. In *Commonwealth* v. *Knapp,* 9 Pick. 496, 515, the jury was taken on a view with the consent of the defendant. In neither case was anything said to the defendant by the court indicating that under any circumstances he could accompany them. It would be difficult to think of two capital cases tried by more able counsel or presided over by judges of greater learning or of higher passion for justice. They were both tried before the full court. See *Commonwealth* v. *Phelps,* 210 Mass. 78, 82. They must be taken in this respect to state the correct practice in this Commonwealth. The question whether a view should be taken was plainly decided after deliberation by the court. Although there is no discussion of this point in either of those decisions, it is unthinkable that any matter of fundamental right should have escaped the attention of the justices then composing the court.

"There are obvious practical objections to the contention that as matter of right a defendant in a criminal

case may accompany the jury on a view. The whole subject rests in the sound discretion of the court. That discretion commonly and wisely has been exercised so that the defendant in a criminal case does not accompany the jury on a view.

"Plainly whatever rights the defendant had could be waived by him. Apparently the judge found they were so waived in the case at bar. *Valdez* v. *United States,* 244 U. S. 432. *People* v. *Thorn,* 156 N. Y. 286. *State* v. *Slorah,* 118 Maine, 203, 215, 216. *Blythe* v. *State,* 47 Ohio St. 234. *State* v. *Suber,* 89 S. C. 100. *Shular* v. *State,* 105 Ind. 289. *State* v. *Congdon,* 14 R. I. 458.

"It follows that the constitutional right of the defendant 'to meet the witnesses against him face to face' was not violated. Declaration of Rights, Art. 12. *Commonwealth* v. *Slavski,* 245 Mass. 405.

"Here again the discretion of the trial judge would control on a motion for new trial because constitutional rights must be seasonably asserted even in criminal cases. *Lebowitch, petitioner,* 235 Mass. 357, 363.

"It follows from what has already been said that manifestly absence of the defendant from the view taken by the jury was no violation of G. L. c. 278, §6, to the effect that 'A person indicted for a felony shall not be tried unless he is personally present during the trial.' "

This question was again considered by the Supreme Judicial Court in the case of *Commonwealth* v. *Belenski,* 276 Mass. 35. In this case the Court reaffirmed the decision of the *Dascalakis* case:

"2. The next assignment of error relates to the refusal of the judge to permit the defendant to accompany the jury on the view. This refusal was within the sound discretion of the trial judge. The entire subject of a defendant's right to accompany a jury on a view was

fully considered in *Commonwealth* v. *Dascalakis*, 246 Mass. 12, 28-31. There was no error in this ruling."

The petitioner contends that the decision in the *Dascalakis* case, in so far as it holds that the defendant has no right to accompany a jury on a view, is *obiter dictum*. This contention is unsound. The Court overruled the exceptions of the defendant in that case for two reasons: first, that the defendant had no right to accompany the jury on a view, that the question as to whether or not he should be permitted to do so was a matter resting within the sound discretion of the trial Court, and, second, that even if he had such a right he had waived it. Each of these reasons individually would furnish a sound basis for the decision of the Court. It is presumptuous to assert that the second reason in the decision was the one which actuated the decision and that the first was merely *obiter dictum*. The first line of reasoning formed the basis for the decision of the fundamental question—whether or not the right exists. The more natural analysis of the dual reasons advanced by the Court—if any such analysis of the decision is desirable or necessary—is that the basic reason represents the adjudication of the Court on the matter and that the second reason advanced by the Court is merely cumulative and essentially superfluous. The Supreme Judicial Court of Massachusetts evidently so construed the decision in the *Dascalakis* case when it dealt with the same subject-matter in the *Belenski* case, as, in the latter case, it categorically held that no right existed to enable the defendant to accompany the jury on a view and that the trial Court did not err in refusing to permit the defendant to be personally present during the taking of the view, quoting the *Dascalakis* case as authority for this statement of law.

The history of the law relative to the taking of jury views in criminal cases in Massachusetts is summarized in Norman & Houghton, Massachusetts Trial Evidence (2d ed.), §1519:

"It was at one time doubted if a view could be taken in a capital case because it was not in the presence of the accused (*Commonwealth* v. *Parker*, 2 Pick. 549). Later a view was granted on request of the jury, concurrence of counsel on both sides and the prisoner, but only the officers went with the jury and no one was allowed to speak to them (*Commonwealth* v. *Knapp*, 9 Pick. 496, 515). Later under authority of a statute (G.L. c. 234, §35) a view was allowed in a capital case without hesitation, with counsel of both sides present (*Commonwealth* v. *Webster*, 5 Cush. 295, 298) and this proceeding is now regarded as well established. But there can be no comment or discussion at the view and counsel may merely point out essential features. Refusal to allow the defendant to accompany the jury is no violation of his constitutional right to meet the witnesses against him face to face or of his statutory right to be personally present during the trial (*Commonwealth* v. *Dascalakis*, 246 Mass. 1213)."

The petitioner has devoted considerable effort in an attempt to show that the recent decisions of the Supreme Judicial Court of Massachusetts in the *Dascalakis*, *Belenski* and *Snyder* cases were based on a misconception of the law and practice as existing in Massachusetts prior to the *Dascalakis* decision in 1922. Argument along this line is not proper in the present proceedings. These decisions of the Massachusetts Supreme Judicial Court must be considered by this Honorable Court in this proceeding as being the law of the Commonwealth of Massachusetts on the subject.

"Whether the state court erred in its construction of the state constitution and statutes . . . is not a federal question. We are bound by the construction which the state court gives to its own constitution and statutes." *West* v. *Louisiana*, 194 U.S. 258, 261.

"He [plaintiff] seems to make an issue with the court of appeals of the state upon the law of the state and to contend that the court erred in the interpretation and application of that law. This contention encounters the ruling in *In re Converse,* 137 U. S. 624, 631, and other cases which hold that 'a state cannot be deemed guilty of a violation of its obligations under the constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.'

"We cannot assume error in the decision of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of the State—common, statutory and constitutional. Our inquiry can only be, did the state law as applied afford plaintiff in error due process as those words are used in the Fourteenth Amendment?" *Howard* v. *Kentucky,* 200 U.S. 164, 173.

THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS AS SET FORTH IN THE STATUTES OF SAID COMMONWEALTH AND THE DECISIONS OF THE SUPREME JUDICIAL COURT OF SAID COMMONWEALTH DO NOT CONSTITUTE A VIOLATION OF ANY RIGHT OF A DEFENDANT TO MEET WITNESSES FACE TO FACE OR TO BE PRESENT DURING THE ENTIRE TRIAL FOR A FELONY.

The so-called right of a defendant to be confronted with the witnesses against him which was perpetuated by the Constitution of the United States in so far as it affects the federal Courts and by the Constitutions of most all states, including Massachusetts, in so far as it affects procedure in the state Courts was "designed to prevent secret trials in which the accused was often arrested and executed without a hearing, and without any knowledge as to who were his accusers, or the evidence upon which they relied" (*People* v. *Thorn,* 156 N.Y. 286, 42 L.R.A. 368, 388). The main and essential purposes sought to be accomplished by the rule of confrontation was to secure for the defendant

the opportunity of cross-examination. The defendant "demands confrontation not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers" (Wigmore on Evidence (2d ed.), §1395). The statutes and constitutional provisions establishing the right of confrontation are intended "to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions of *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination" (*Dowdell* v. *United States,* 221 U.S. 325, 330, citing *Mattox* v. *United States,* 156 U.S. 237, 242; *Kirby* v. *United States,* 174 U.S. 47, 55; Wigmore on Evidence, vol. III, §§ 1396, 1397).

As a right primarily designed to insure cross-examination the right of confrontation is limited in application to witnesses or testimonial evidence. It does not extend to the kind of evidence adduced at a view taken by a jury, classified by Wigmore (on Evidence (2d ed.), §1803) as "autoptic proference, real evidence, or the tribunal's observance of the thing itself." Cross-examination of this type of evidence is to no purpose. The function of cross-examination is to ascertain in detail the elements of weakness that detract from the trustworthiness of a person's statement. Where human credit is not involved, cross-examination has no place. How can the view be cross-examined? The basic reason for the rule being the right of cross-examination, the rule has no application in cases where cross-examination is not possible—as in the instant case.

It is admitted that a view is evidence in the sense that it may be and properly should be considered by the jury in

their deliberations. Its chief function, however, is to enable the jury to better understand the testimony which has or may be introduced during the course of the trial. No witnesses are heard on a view. There may be no comment or discussion. The jury may simply use their eyes and their attention may be directed to particular portions of the view by counsel who are permitted to accompany them. To say that merely because a view is evidence the defendant must be present is fallacious and unsound. The right to meet witnesses face to face is limited to testimonial evidence introduced by witnesses who may be cross-examined. To call a view the giving of evidence by so-called "dumb witnesses" is merely employing a legal fiction in an effort to reach an unsound result. The proper construction of the defendant's right is as determined by the Supreme Judicial Court of Massachusetts—that he has the right to be present when testimony is taken against him, but that this right does not extend wherever evidence, particularly evidence of the type represented by a view, is adduced.

Another argument advanced for the proposition that evidence of the type adduced at a view is not within the contemplation of the defendant's right of confrontation is summarized in the case of *People* v. *Thorn*, 156 N.Y. 286, 42 L.R.A. 368, 389, as follows:

> "If seeing the locality is the taking of evidence in one case, it must be in another. If viewing the locality during the trial is the taking of testimony, why is not the seeing of the locality before the trial the taking of testimony? It often occurs that crimes are committed in public places, familiar to the greater portion of the inhabitants of a county, where it would be difficult, if not impossible, to procure a jury which had not seen the locality time and time again. Such persons, having seen the locality, and being familiar with it, could, if they were sitting upon a jury, readily determine whether a witness was accurately describing the place. Their

knowledge of the locality would constantly operate upon their minds during the trial in determining the force and effect which should be given to the testimony. If seeing is the taking of evidence, it would follow in every case that a juror who had seen and was familiar with the locality would be incompetent to sit as a juror, for he would have taken testimony in the absence of the accused, with which he had never been confronted, or had an opportunity to explain. To illustrate further: In front of this capitol, in the city of Albany, there is a park. On the opposite side of the park stands the courthouse. Should a felony be committed in the park, the accused could not well be brought to trial for the reason that every juror summoned in the case necessarily would see and view the locality every time he entered or departed from the courthouse. These are some of the absurd results which would naturally follow the construction contended for. Our minds do not incline that way. Every reasonable safeguard provided by the Constitution or the Bill of Rights for the protection of persons accused of crime should be scrupulously recognized and preserved by the courts; but we should not attempt to deprive the jury of the means of determining the truth or falsity of the testimony of witnesses, or to so surround criminal trials with technical and profitless restrictions as to make it difficult, if not impossible, to reach a verdict that can be upheld. It appears to us that the more rational and reasonable construction to be given to the provisions of the section is that the view is not the taking of testimony within the meaning of the Bill of Rights; but that the sole purpose and object of the view is to enable the jurors to more accurately understand and more fully appreciate the testimony of witnesses given before them. The wise and beneficent object of the statute should not be lost sight of. Trial judges should be careful to see that

the purpose of the statute is not departed from, and the view used for other purposes than that contemplated."

The second right which the petitioner contends is violated by the refusal to allow him to attend the view in person with the jury is the right of a defendant on trial for a felony to be present at all stages of his trial. The answer to this contention is that the view is not a part of the trial. The place of the trial is not changed while the view is being taken. The trial is merely suspended. The trial could not take place in the absence of the judge, yet the provisions of the Massachusetts statutes do not require the judge to attend upon the jury during the time that it is inspecting the premises. It is true that the judge was physically present himself at the view in the present case. His presence, however, was purely voluntary and not necessary to the validity of the view. Whether he should or should not accompany the jury rested within his sound discretion. In fact, the presence of the presiding justice at a view is unusual in Massachusetts practice. In the *Dascalakis* case, which first definitely settled the law in Massachusetts that the defendant has no right to accompany the jury on view, the judge did not superintend the view by the jury. The mere voluntary presence of the presiding justice at the view in this case did not change the nature of the proceedings. It did not thereby make the view an integral part of the trial. As the presence of the judge is necessary at all stages of the trial, and as the presence of the judge is not required at the view, it follows that the view is not a part of the trial, but is, as termed by the Supreme Judicial Court of Massachusetts, a temporary suspension of the trial.

Admitting, however, for the moment that the view is a part of the trial, it still does not follow that the defendant has a right to be present. The application of the rule that the defendant has a right to be present at all stages of the

trial must be limited to those stages of the trial where there is an inherent necessity for his presence. It cannot be seriously advanced by any one that the defendant has the right to be present during the deliberations of the jury. Yet the deliberations of the jury are as much a part of the trial as the taking of the view. It has been frequently held that the defendant has no right to be present during the hearing of exceptions on appeal, even where the Appellate Court enters final judgment, nor in the trial Court when the rescript is received by the Court and judgment and sentence affirmed. *Schwab v. Berggren,* 143 U.S. 444; *Fielden* v. *Illinois,* 143 U.S. 452.

What was the inherent necessity for the defendant's presence at the view? The defendant, if present, could not lawfully ask questions nor make statements. The sole value of his presence would lie in the opportunity to see that nothing irregular was done and to obtain such a knowledge of what was done as would assist him in the subsequent conduct of the trial. But he may do all these things through his counsel, who is permitted to accompany the jury in the capacity as shower. Counsel points out such parts as the accused has directed, and does so with reference to the forthcoming testimony. Counsel is in a position to observe all that is done and to see that no irregularities are committed on the view. Counsel is in a position to make all observations as may be useful to the defendant. It must also be borne in mind that the defendant was not denied the right to visit the scene of the view in order to make observations in the company of his counsel at some time other than the visit by the jury. This privilege was not requested. At such a visit the defendant could have personally made such observations as deemed necessary for the preparation of his defense. If the Court denied him the right to visit the scene of the alleged crime in the company of his counsel, or if the Court denied to counsel the right to accompany the jury on the view, it may well be that the defendant's rights

would have been substantially prejudiced. But counsel for the defendant was present and there was nothing that could have been accomplished by the defendant personally in addition to that which his counsel could and, in this case, did accomplish for him.

It must also be borne in mind that the defendant had no right to have a view taken. Whether or not there shall be a view in a criminal case rests within the sound discretion of the trial judge. There was no power at common law on the part of the Court to order a view unless possibly with the consent of all parties. The provisions of law relative to views are purely statutory. Not only is the determination of whether or not a view shall be taken within the discretion of the trial judge, but the details of the procedure to be followed at the view are to be determined within his sound discretion. Whether or not the trial judge shall be present in person, whether or not the proceedings at the view shall be taken down stenographically, whether the view shall be taken at the commencement of the trial, during the trial or at the termination of the trial—the determination of these and all other administrative and procedural details rests within the sound discretion of the Court. The only objection the defendant can make is that his rights shall not be substantially prejudiced by the procedure as thus determined by the Court. Both the right to and the procedure of a view are statutory and discretionary with the Court. No substantial prejudice to the rights of the defendant in the exercise of that discretion has been shown by the defendant. No actual damage to the defendant in the exercise of that discretion in the present case has ever been asserted by the defendant. If actual damage were asserted by the defendant at any time during the course of the trial, the same could have been rectified by the trial judge. If anything prejudicial had actually occurred at the view, the same, if properly called to the attention of the trial judge, could have been remedied during the trial, or,

if necessary, by a second view. No actual prejudice or injury was claimed. Where, as in the present case, the defendant has no right to a view, and no right to any particular procedure in the taking of the view, he should not be permitted to complain either of the view or of the procedure unless he can show an actual and substantial prejudice.

The decisions of the various Courts of last resort of the different states on the right of an accused to be present in person at the taking of a view by a jury are in direct conflict. Practically all the cases in point are collected in notes in 42 L.R.A. 368, 30 A.L.R. 1357, Wigmore on Evidence (2d ed.), note following §1803 in vol. III, pages 835 and 836. Some of the leading decisions of other state Courts supporting the view as set forth by the Supreme Judicial Court of Massachusetts are the following:

People v. *Thorn,* 156 N.Y. 286, 42 L.R.A. 368.
State v. *Much* (Wash.), 287 Pac. 57, 61.
State v. *Lee Doon,* 7 Wash. 308, 34 Pac. 1103.
State v. *Reed,* 3 Idaho, 754, 35 Pac. 706.
Shular v. *State,* 105 Ind. 289, 293, 4 N.E. 870.
State v. *Rogers,* 145 Minn. 303, 177 N.W. 358.
State v. *Chu Gong,* 17 Ore. 635, 636, 21 Pac. 882.
State v. *Mortenson,* 26 Utah, 312, 73 Pac. 562.
Close v. *Samm,* 27 Iowa, 503.

EVEN IF THE PETITIONER HAS BEEN DEPRIVED OF THE RIGHT TO CONFRONT WITNESSES AND BEING PRESENT AT ALL STAGES DURING THE TRIAL, THIS DEPRIVATION IN THE PRESENT CASE IS NOT AN INFRINGEMENT OF HIS RIGHT TO DUE PROCESS OF LAW WITHIN THE MEANING OF THAT TERM AS USED IN THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The petitioner in the present case cannot object to any alleged violation of rights set forth in the Sixth Amendment

of the Constitution of the United States, as that amendment applies only to procedure in the federal Courts.

Twining v. *New Jersey*, 211 U.S. 78, 93.
Barrington v. *Missouri*, 205 U.S. 483.
Brown v. *New Jersey*, 175 U.S. 172.
Spies v. *Illinois*, 123 U.S. 131.
Barron v. *Baltimore*, 7 Pet. 243.

The objection of the petitioner to any alleged violation of right must be limited to a consideration of whether the right allegedly violated falls within the purview of the term "due process of law" as employed in the Fourteenth Amendment to the Constitution of the United States. Is the right of confrontation of witnesses and the presence of the defendant at all stages of a trial for a felony, as applicable to a view by a jury during the course of the proceedings—

> "of such a nature that it must be included in the conception of due process [?] Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the state to order its own affairs and govern its own people except so far as the Federal Constitution expressly or by fair implication has with-

drawn that power." *Twining* v. *New Jersey*, 211 U.S. 78, 106.

"Some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226." *Twining* v. *New Jersey*, 211 U.S. 78, 99.

We then come to the consideration of what rights are so fundamentally ingrained in the "principles of liberty and justice which inhere in the very idea of free government" that they may be said to be included within the term "due process of law" as used in the Fourteenth Amendment to the Constitution. Is the alleged right of a defendant to be present in person during the taking of a view by a jury such a right? In the case of *Twining* v. *New Jersey*, 211 U.S. 78, this Honorable Court sought to review all prior decisions bearing upon this subject. It was therein pointed out that up to that time only two rights had been recognized as being of such a fundamental nature that they were included within the intent of the due-process clause of the Fourteenth Amendment: (1) The right to a person to be heard only before a Court having jurisdiction, which principle was set forth in the previous decisions of *Pennoyer* v. *Neff*, 95 U.S. 714; *Scott* v. *McNeal*, 154 U.S. 34; and *Old Wayne Life Association* v. *McDonough*, 204 U.S. 8; and, (2) The right of notice and opportunity for a hearing, which principle was set forth in the previous decisions of *Hovey* v. *Elliott*, 167 U.S. 409, and *Roller* v. *Holly*, 176 U.S. 398. All other claims of right raised and considered previous to the *Twining* case had been held not to be of such a fundamental nature as to be included within the purview of the term "due process of law" as contained in the Fourteenth Amendment.

"Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law

established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

Twining v. *New Jersey*, 211 U.S. 78, at 110.

The cases wherein the Court determined alleged rights not to be within the protection of the Fourteenth Amendment as enumerated in the *Twining* case are as follows:

Walker v. *Sauvinet*, 92 U.S. 90:

(The petitioner objected to an alleged deprivation of the right to a trial by jury in civil cases.)

Caldwell v. *Texas*, 137 U.S. 692:

(The petitioner objected to the form of an indictment.)

Leeper v. *Texas*, 139 U.S. 462:

(The petitioner objected to the qualifications of a juror and certain evidence admitted at his trial, etc.)

Hallinger v. *Davis*, 146 U.S. 314:

(The petitioner objected to the New Jersey law which permitted a defendant to plead guilty to murder and the court without a jury to hear evidence and determine the degree of murder.)

McNulty v. *California*, 149 U.S. 645:

(The petitioner objected to a decision of the California court ordering that he be punished under a law existing at the time of the com-

mission of a crime although the law had been changed during the pendency of his appeal to the state appellate court.)

McKane v. *Durston*, 153 U.S. 684:

(The petitioner objected to the operation of a New York statute which provided that a defendant may be freed upon bail pending appeal only if the trial judge certifies that there is a reasonable doubt relative to verdict.)

Iowa Central v. *Iowa*, 160 U.S. 389:

(The petitioner objected to operation of the Iowa statute which permitted summary entry of judgment upon plaintiff's motion on the ground that the answer did not set up a legal defense.)

Lowe v. *Kansas*, 163 U.S. 81:

(The petitioner objected to operation of a Kansas statute which permitted the assessment of costs against the prosecutor where the defendant was found not guilty of a charge of criminal libel and the jury found that the proceedings were instituted without probable cause.)

Allen v. *Georgia*, 166 U.S. 138:

(The petitioner objected to the action of the Supreme Court of Georgia in dismissing his appeal because he had escaped from custody pending the appeal and was a fugitive from justice.)

Hodgson v. *Vermont*, 168 U.S. 262:

(The petitioner objected to the form of information employed in the Vermont practice.)

Brown v. *New Jersey*, 175 U.S. 172:

(The petitioner objected to the operation of a New Jersey statute which permitted the use of struck juries within the discretion of the trial judge.)

Bolln v. *Nebraska*, 176 U.S. 83:

(The petitioner objected to the use of information rather than indictment in criminal proceedings and to the refusal of a jury trial on his plea in abatement.)

Maxwell v. *Dow*, 176 U.S. 581:

(The petitioner objected to the state statute allowing trial in criminal cases by a jury of less than twelve persons.)

Simon v. *Craft*, 182 U.S. 427:

(The petitioner objected to the Louisiana statute relative to lunacy proceedings.)

West v. *Louisiana*, 194 U.S. 258:

(The petitioner objected to the use in evidence at his trial of a deposition taken in a lower court examination where there had been opportunity for cross-examination and the witness was absent from the state at the time the deposition was received in evidence.)

Marvin v. *Trout*, 199 U.S. 212:

(The petitioner objected to the operation of an Ohio statute which created a lien for moneys lost in gambling upon the premises used if said usage was with the knowledge of the owner.)

Rogers v. *Peck*, 199 U.S. 425:

(The petitioner objected to the procedure employed in Vermont relative to the time of

execution of a murder sentence when a reprieve is issued by the governor.)

Howard v. *Kentucky*, 200 U.S. 164:

(The petitioner objected to the fact that he was not present while additional instructions were given by the judge to the jury during his trial for a felony.)

Rawlins v. *Georgia*, 201 U.S. 638:

(The petitioner objected to the exclusion of certain classes of persons from the jury list, said exclusion not being based on race discrimination.)

Felts v. *Murphy*, 201 U.S. 123:

(The petitioner objected to the proceedings at his trial on the ground that he was deaf and had heard no part of the evidence during the trial.)

In discussing these cases the Court said:

"Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with." *Twining* v. *New Jersey*, 211 U.S. 78, 111.

To this list the Court in the *Twining* case added the right to protection against self-incrimination as being a right not within the protection of the Fourteenth Amendment.

The Court in the *Twining* case did not, however, close the door to any future determination assigning any further rights to the class of rights which is protected by the Fourteenth Amendment. It refused to set forth a conclusive and binding definition of what rights were included within the term "due process of law," preferring that this class be developed as the occasion should arise.

> "Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise." *Twining* v. *New Jersey,* 211 U.S. 78, 100.

In the case of *Powell* v. *Alabama,* 287 U.S. 45, this Honorable Court added the right to an opportunity for proper representation by counsel in the preparation and trial of the defense of a criminal charged with a capital offense to the class of rights which are included within the term "due process of law."

It is the contention of the respondent in this action that the refusal of the trial judge to permit the petitioner to accompany the jury on the view, if it be a violation of any right of the petitioner at all—and it has been contended in the first portion of this brief that there was no violation of any right—is not a violation of that class of rights which is insured to the petitioner by the Fourteenth Amendment, but rather the violation of a right which does not come within

the protection of the Fourteenth Amendment and is similar to the rights claimed in the long list of cases set forth in the decision in the *Twining* case.

The cases previously decided by this Honorable Court which are most closely analogous to the present case are those of *Howard* v. *Kentucky,* 200 U.S. 164, and *Brown* v. *New Jersey,* 175 U.S. 172.

In the case of *Howard* v. *Kentucky,* 200 U.S. 164, the defendant objected to the fact that the trial Court gave additional instructions to the jury in his absence. In disposing of this objection this Honorable Court said:

> "It is manifest, therefore, that it is the law of Kentucky that occasional absence of the accused from the trial, from which no injury results to his substantial rights, is not reversible error. And we think, in applying that rule to the case at bar, plaintiff in error was not deprived of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States." *Howard* v. *Kentucky,* 200 U.S. 164, 175.

The presence of the petitioner at the view in the present case was no more a fundamental necessity to the rights of a defendant than the presence of the defendant at the stage of the proceedings set forth in the *Howard* case.

In the case of *Brown* v. *New Jersey,* 175 U.S. 172, the defendant objected to the trial judge in his discretion ordering a "struck jury," rather than drawing a jury under the usual provisions of law. In disposing of this objection this Honorable Court said:

> "There is no mere arbitrary power in this respect, any more than in the granting or refusing of a continuance. The fact that in one case the plaintiff or defendant is awarded a continuance and in another is refused does not make in either a denial of the equal protection of the laws. That in any given case the dis-

> cretion of the court in awarding a trial by a struck jury was improperly exercised may perhaps present a matter for consideration on appeal, but it amounts to nothing more.''

The petitioner in this case had no more right to a view by the jury nor of a view according to any procedure other than the procedure set forth by the trial judge in the exercise of his discretion than the defendant in the *Brown* case had relative to the procedure of drawing the jury. In neither case has he a valid objection to the exercise of the discretion vested in the trial judge unless he can show a substantial and an actual injury.

The petitioner has cited several decisions of this Honorable Court in support of his contention that his constitutional rights have been infringed. None of the cases thus cited deal with constitutional rights as guaranteed by the Fourteenth Amendment.

The case of *Lewis* v. *United States,* 146 U.S. 370, was an appeal from the judgment of an inferior Court of the United States. The question at issue was whether the prisoner had the right to be present when challenges of jurors were being made. The Court held that the practice in federal Courts must not conflict with or abridge the right of the prisoner as it exists at common law. The Court did not consider the effect of the Fourteenth Amendment to the Constitution. The decision further specifically held that the right to be brought face to face with jurors when challenges are made is a substantial right of the prisoner. This case is differentiable from the present case on several grounds: (1) The right in the *Lewis* case was a common-law right. The right in the present case relates to a statutory procedure. (2) The violation of the right in the *Lewis* case was a violation of the laws of the United States. The alleged violation of right in the present case is allegedly a violation of the due-process clause of the Fourteenth Amendment. (3) The right

in the *Lewis* case was a substantial right, and its violation resulted in substantial and actual injury. In the present case the injury claimed by the petitioner is neither substantial nor actual.

The same differentiations may be made between the present case and the case of *Hopt* v. *Utah,* 110 U.S. 574. That case was a review of the decision of a territorial Court, and the decision concerned itself principally with the construction of the law of the territory. The possible effect of the Fourteenth Amendment to the Constitution was not considered. The absence of the prisoner complained of in that case was absence at the time of examination of jurors during the period of challenging. It should also be noted that in the *Hopt* case the Court decided that the right of the defendant to be present was so substantial that it could not be waived. The petitioner in the present case admits that the right of a defendant to be present at a jury view may be waived.

> "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. . . . Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential that he shall be personally present at the trial, that is, at every stage of the trial when *his substantial rights may be affected* by the proceedings against him." (Italics ours.)
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> *Hopt* v. *Utah,* 110 U.S. 574, 579.

In the case of *Schwab* v. *Berggren,* 143 U.S. 444, the Court held that the presence of the defendant is not necessary when the Appellate Court of a state affirms sentence—on the ground that his presence is not necessary where his sub-

stantial interests as a defendant are not involved. In the case of *Dowdell* v. *United States,* 221 U.S. 325, the Court held that the defendant could not object to his absence when the judge and clerk were making up the record of the case for the Appellate Court. This case was an appeal from the Philippine Islands. Neither of these two cases cited by the petitioner is relevant to the question at issue in the present case.

The inapplicability of the *Lewis* and *Hopt* cases to a question arising from a practice of a state Court was specifically pointed out in the case of *Frank* v. *Mangum,* 237 U.S. 309, 340:

> "It is insisted that the enforced absence of Frank at that time was not only a deprivation of trial by jury, but was equally a deprivation of due process of law within the meaning of the Amendment, in that it took from him at a critical stage of the proceeding the right or opportunity to be heard. But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Indictment by grand jury is not essential to due process (*Hurtado* v. *California,* 110 U.S. 516, 532, 538; *Lem Woon* v. *Oregon,* 229 U.S. 586, 589, and cases cited). Trial by jury is not essential to it, either in civil cases (*Walker* v. *Sauvinet,* 92 U.S. 90), or in criminal (*Hallinger* v. *Davis,* 146 U.S. 314, 324; *Maxwell* v. *Dow,* 176 U.S. 581, 594, 602, 604).
>
> "It is argued that a State may not, while providing for trial by jury, permit the accused to waive the right to be heard in the mode characteristic of such trial, including the presence of the prisoner up to and at the time of the rendition of the verdict. But the cases cited

do not support this contention. In *Hopt* v. *Utah*, 110 U.S. 574, 578 (principally relied upon), the court had under review a conviction in a territorial court after a trial subject to the local code of criminal procedure, which declared: If 'the indictment is for a felony, the defendant *must be* personally present at the trial.' The judgment was reversed because of the action of the trial court in permitting certain challenges to jurors, based upon the ground of bias, to be tried out of the presence of the court, the defendant and his counsel. The ground of the decision of this court was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirement as to his personal presence was denied on the ground that his life could not be lawfully taken except in the mode prescribed by law. No other question was involved. See *Diaz* v. *United States*, 223 U.S. 442, 455, 458.

"The distinction between what the common law requires with respect to trial by jury in criminal cases, and what the States may enact without contravening the 'due process' clause of the Fourteenth Amendment, is very clearly evidenced by *Hallinger* v. *Davis*, 146 U.S. 314, and *Lewis* v. *United States* 146 U.S. 370, which were under consideration by the court at the same time, both opinions being written by Mr. Justice Shiras. In the *Lewis Case*, which was a conviction of murder in a Circuit Court of the United States, the trial practice being regulated by the common law, it was held to be a leading principle, pervading the entire law of criminal procedure, that after indictment nothing should be done in the absence of the prisoner; that the making of challenges is an essential part of the trial, and it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time the challenges were made; and that in the absence of a statute, this

right as it existed at common law must not be abridged. But in the *Hallinger Case,* where a State by legislative enactment had permitted one charged with a capital offense to waive a trial by jury and elect to be tried by the court, it was held that this method of procedure did not conflict with the Fourteenth Amendment. So in *Howard* v. *Kentucky,* 200 U.S. 164, 175—a case closely in point upon the question now presented—this court, finding that by the law of the State an occasional absence of the accused from the trial, from which no injury resulted to his substantial rights, was not deemed material error, held that the application of this rule of law did not amount to a denial of due process within the meaning of the Fourteenth Amendment.

* * * * * * * *

"Our conclusion upon this branch of the case is, that the practice established in the criminal courts of Georgia: that a defendant may waive his right to be present when the jury renders its verdict, and that such waiver may be given after as well as before the event, and is to be inferred from the making of a motion for new trial upon other grounds alone, when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making that motion; is a regulation of criminal procedure that it is within the authority of the State to adopt. In adopting it, the State declares in effect, as it reasonably may declare, that the right of the accused to be present at the reception of the verdict is but an incident of the right of trial by jury; and since the State may, without infringing the Fourteenth Amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial. The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it and holding

him bound by the waiver amounts to a deprivation of 'due process of law.'"

It is to be noted that, although there was a strong dissenting opinion in the *Frank* case by Mr. Justice Holmes and Mr. Justice Hughes, the dissenting justices were in accord with the views of the majority of the Court in the particular matters material to the present case (p. 346):

> "We lay on one side the question whether the petitioner could or did waive his right to be present at the polling of the jury. That question was apparent in the form of the trial and was raised by the application for a writ of error; and although after the application to the full Court we thought that the writ ought to be granted, we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States."

THERE WAS IN THIS CASE NO INFRINGEMENT OF ANY RIGHTS OF THE PETITIONER GUARANTEED TO HIM UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION BECAUSE HE DID NOT SUSTAIN ANY SUBSTANTIAL OR ACTUAL INJURY BY THE ACTION OF THE TRIAL JUDGE.

The due-process clause of the Fourteenth Amendment was designed solely to protect substantial and fundamental rights of a defendant. In the case of *Howard* v. *Kentucky*, 200 U.S. 164, 173, this Honorable Court said: "It may be admitted that the words 'due process', as used in the Fourteenth Amendment, protect fundamental rights."

The right which the Court held not to be a substantial or fundamental right in the *Howard* case was the right of a defendant to be present at all stages of the trial (in the particular case, while the judge was giving additional instructions to the jury). The Kentucky Court of last resort

held that, although the defendant had a constitutional right (under the Kentucky Constitution) to be present at all stages of the trial, any violation of this right was not reversible error when no actual injury resulted to the defendant's substantial rights. This Honorable Court held that, inasmuch as no substantial injury resulted to the defendant, the alleged violation of rights of the defendant and the application of the rule followed by the Kentucky Courts that no new trial would be granted unless there was an actual injury caused by the alleged violation of the defendant's constitutional rights did not amount to a denial of due process within the meaning of the Fourteenth Amendment. This case becomes directly in point with the present case, as the Kentucky Courts have considered the absence of a defendant while the jury is taking a view in exactly the same category as the absence of the defendant under the circumstances set forth in the *Howard* case. See *Rutherford* v. *Commonwealth*, 78 Ky. 639, in which the Court held that, although the defendant had a constitutional right (under Kentucky Constitution) to accompany the jury on the view, the refusal of the trial judge to allow him to so accompany the jury was not reversible error where the defendant had suffered no substantial or actual injury therefrom.

In the present case there was no substantial or actual injury to any fundamental right possessed by the petitioner. Therefore, the practice, as followed by the Massachusetts Courts, did not amount to a denial of due process.

The claim of substantial injury advanced by the petitioner is that he was prejudiced in his preparation of the case because of the failure to permit him to be present in person while the jury took the view of the premises where the crime was committed. The only function he could have performed at the view would have been to remind his counsel of details to call to the attention of the jury. He himself could not have uttered a single word to the jury. If the petitioner believed that his personal assistance in reminding his coun-

sel of matters relating to the case was necessary for the proper preparation and presentation of his defense, there were ways in which his personal aid in this matter could have been accomplished other than allowing him to attend the taking of the view in person with the jury.

(1) Counsel for the petitioner was aware of the settled law of the Commonwealth of Massachusetts, as decided by the Supreme Judicial Court in the *Dascalakis* and *Belenski* cases, to the effect that it was a matter within the sound discretion of the trial judge whether or not to permit the accused to accompany the jury in person to the view. He knew that the crime for which the accused was about to be placed on trial was a brutal killing. He knew that there was considerable public feeling in the community against the defendant, as is quite common when persons are placed upon trial accused of participating in a cold-blooded holdup and murder. He knew that the place where the view was to be held was a public place, easily accessible to spectators. He knew that a crowd of onlookers might well gather around the premises at the time the jury was taking the view, drawn by the excitement of such a proceeding. He at least claimed that the defendant was not of sound mind. Counsel for the defendant certainly should have known—the inference is almost irresistible that he did know—that there was a strong probability at least, if not a practicable certainty, that, in view of all the circumstances and conditions as enumerated above, the trial judge would exercise the discretion vested in him by the laws of the Commonwealth and refuse to permit the accused to be with the jury in person at the taking of the view—not only because of the fear of a possible general disorder, but for the protection of the best interests of the accused, and to eliminate the possibility of any expression of hostility, animosity or disfavor toward the accused by such spectators as would naturally assemble at the scene—which expressions, committed in the presence of the jury, would most certainly have been prejudicial to the best

interests of the accused. If there were any matters which the accused desired that his counsel call to the attention of the jury on the view which could only be determined by his personally inspecting the premises, a request could have been made of the Court that the accused be permitted to accompany his counsel to the premises on some occasion before the visit of the jury. On such a visit he could have called to the attention of his counsel such matters as he thought might be material. No such request was ever made. Counsel for the accused was appointed by the Court a considerable period of time before the trial. If the presence of the accused at the scene of the crime was important to the proper preparation of his defense to the charge of crime, it certainly appears that such a request would have been made. The time that a jury is taking a view is hardly the appropriate and proper time for a client to advise his counsel relative to matters essential to his defense. Clearly, if any enlightenment of counsel by the accused in person was necessary relative to matters at the scene of the crime, it should have occurred prior to the taking of the view by the jury—particularly in view of the probability, almost akin to certainty, which was or should have been known to counsel, that the accused would not be permitted to accompany the jury on the view. Knowing the high calibre and great ability of counsel for the accused, the inference is almost irresistible that no such enlightenment was considered necessary—for, if there were any substantial need for the presence of the defendant at the scene of the crime, either as an aid in the preparation of the case or to enable counsel to properly point out necessary matters at the scene of the view, a request would most certainly have been made that the accused be permitted to visit the scene of the crime in the company of his counsel prior to the taking of the view—and in all probability such a request, if seasonably made, would have been readily granted.

(2) At the same time as he denied the accused the right to accompany the jury on the view, the trial judge intimated that, if requested, he would permit the accused to visit the scene of the crime with his counsel on some other occasion. No request along the lines of this intimation was ever made. All matters of procedure relative to the holding of a view are entirely within the discretion of the trial judge. It is not uncommon, particularly in a trial of considerable duration, for a jury to take more than one view, often viewing the premises in question at the commencement of the proceedings and again at or near the termination, usually after the completion of the testimony of the witnesses and before argument of counsel or between the time of argument by counsel and the charge by the Court. If any substantial right of the accused was substantially injured by the refusal of the Court to permit him to accompany the jury on the view at the commencement of the trial, that injury could have been remedied by a second view. The only conceivable prejudice that the accused could have suffered was by the failure of his counsel to call the jury's particular attention to some particular object at the scene of the view. The entire scene of the view received the jury's general attention. Whether or not such an omission did occur could have been easily ascertained by counsel for the accused by requesting permission of the Court to visit the scene of the view with the accused—and, once ascertained, this omission could easily have been rectified by the taking of a second view. No request that the accused be permitted to visit the scene of the crime with his counsel was made. No request for a second view was made. Again, it is hardly conceivable that counsel of the ability and astuteness possessed and displayed by counsel for the defendant in this case could have failed to avail himself of any opportunity to correct an injury to any substantial right of the accused, if any such injury existed. Under all the circumstances, the failure of counsel to avail himself of such an opportunity is tantamount to an admis-

sion that no substantial right of the accused was in fact impaired by the action of the trial judge in refusing the accused the privilege of accompanying the jury on the view.

The Petitioner was Not Denied the Effective Assistance of Counsel.

The petitioner claims that he was denied the effective aid of counsel in the preparation of his defense, in contravention of his rights as allegedly determined by this Honorable Court in the case of *Powell* v. *Alabama*, 53 S. Ct. 55.

It should first be noted that the decision in the *Powell* case was expressly limited to the facts as existing in relation to that particular case (p. 65):

> "But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain im-

> mutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' Holden v. Hardy, supra. In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel."

The short answer to this contention of the petitioner is that the ruling of the trial judge refusing to allow the defendant to accompany the jury on the view did not affect the preparation of the petitioner's defense. The purpose of a view by a jury is to enable the jury to more easily understand the testimonial evidence offered during the course of the trial. It is not the proper time "to acquaint counsel with facts necessary to his defence." Any consultation between client and attorney relative to matters of defense should not be conducted in the presence of the jury. That the mere denial to the petitioner of the right to accompany the jury on the view, considered together with the fact that the petitioner never sought any opportunity to confer with counsel at the scene of the crime other than at the time the jury was taking a view, was not a substantial nor an actual injury to the petitioner's alleged right of effective assistance by counsel in the preparation of his defense, is adequately demonstrated by the discussion in the preceding section of this brief.

The Petitioner was Not Denied the Equal Protection of the Laws.

The contention of the petitioner that he was denied the equal protection of the laws is based upon the fallacious premise that, had he been out on bail, he would have been free to accompany the jury on the view. The procedure at the view was, however, entirely within the discretion of the

trial judge. Even if he had been free on bail, the trial judge could have barred him from accompanying the jury on the view. His position relative to his right to accompany the jury on the view was no different because he was in custody than if he had been at liberty under bail—in either case it was a matter resting within the sound discretion of the trial judge.

Conclusion.

In conclusion the respondent respectfully submits:

1. No rights of the petitioner were impaired by the refusal of the trial judge to allow him to accompany the jury on the view.

2. Even if this ruling was an infringement of any of the petitioner's rights, the alleged violation of rights did not constitute an impairment of any of the rights guaranteed to the petitioner by the due-process clause of the Fourteenth Amendment.

3. There was no denial of due process to the petitioner, because he did not suffer any substantial or actual damage as the result of any ruling of the trial judge.

4. The petitioner was not denied the effective assistance of counsel nor the equal protection of the laws.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 241.—October Term, 1933.

Herman Snyder, Petitioner,
vs.
Commonwealth of Massachusetts

On Writ of Certiorari to the Superior Court in and for the County of Middlesex, Commonwealth of Massachusetts.

[January 8, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

On April 9, 1931, James M. Kiley was shot to death at a gasoline station at Somerville, Massachusetts. Three men, Garrick, Donnellon and the petitioner Snyder joined in the murder and in the attempted robbery that led to it. Garrick confessed to his part in the crime and became a witness for the state. Donnellon and Snyder were tried together and sentenced to be put to death. The jury found upon abundant evidence that the guilt of each had been established beyond a reasonable doubt. At the trial and on appeal Snyder made the claim that through the refusal of the trial judge to permit him to be present at a view there had been a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. The Supreme Judicial Court of Massachusetts affirmed the conviction. Mass. Advance Sheets, 1933, 809; 185 N. E. Rep. 376. A writ of certiorari brings the case here.

At the opening of the trial there was a motion by the Commonwealth that the jury be directed to view the scene of the crime. This motion was granted. In granting it the court acted under a Massachusetts statute which provides "The court may order a view by a jury impanelled to try a criminal case." General Laws of Massachusetts, c. 234, § 35. The court appointed counsel for Donnellon and for Snyder to represent their respective clients at the place to be viewed. Counsel for Donnellon moved that he be permitted to go there with his client after the view, but did not ask that his client be present with the jury. The court stated

that such an order would probably be made. Counsel for Snyder moved that his client be permitted to view the scene with the jury, invoking the protection of the federal constitution. This motion was denied. The jurors were then placed in charge of bailiffs duly sworn. Accompanied by these bailiffs and also by the judge, the court stenographer, the District Attorney and the counsel for the defendants, they went forth to make their view.

The first stopping place was at the filling station, 13 Somerville Avenue. Entering the station, the District Attorney pointed out to the jurors the particular parts of the building that he wished them to observe. He asked them to note the window at the rear, its position with reference to the entrance, the position of other windows to the right, the size of the room, the angle made by a partition, and the location of other objects. Counsel for Snyder called attention to the view from within the building looking out, and to the condition of the floor. Leaving the station by the front door, the jury viewed the building from the other side of the street. The District Attorney asked that note be made of the driveway to the right and left of the station, the three pumps in front, and also the width of the street. Counsel for Snyder called attention to the nature of the travel, the setback of the station from the roadway, and in particular the possibility of observing from without what was taking place within. After the visit to the station the jurors were taken a short distance away where they were asked to make note of the lay-out of the streets. They then went back to the station, the District Attorney saying that he had omitted to direct their attention to the lights. The lights were then observed, the dimensions of a fence in front of them, and also, once more, the gasoline pumps. The District Attorney stated that the middle pump was not there at the time of the homicide. Counsel for the petitioner answered that he had no knowledge on the subject but would accept his adversary's statement. Thereupon the judge, who had guided the proceeding, stated the agreement to the jurors assembled on the walk. "It is agreed," he said, "that at the time of the offense, that is, on April 9, 1931, there were but two pumps in front of the gasoline station, the one on the extreme right that is painted green, and the one on the extreme left that is painted black. Those two were there. The one in the middle, with the blue striping on it, was not there."

After the completion of the view, the group returned to the court house and the trial went on. In charging the jury the judge said, "Now what have you before you on which to form your judgment and to render your finding and your verdict? The view, the testimony given by the witnesses and the exhibits comprise the evidence that is before you." The question in this court is whether a view in the absence of a defendant who has made demand that he be present is a denial of due process under the Fourteenth Amendment.

The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining* v. *New Jersey*, 211 U. S. 78, 106, 111, 112; *Rogers* v. *Peck*, 199 U. S. 425, 434; *Maxwell* v. *Dow*, 176 U. S. 581, 604; *Hurtado* v. *California*, 110 U. S. 516; *Frank* v. *Mangum*, 237 U. S. 309, 326; *Powell* v. *Alabama*, 287 U. S. 45, 67. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. *Walker* v. *Sauvinet*, 92 U. S. 90; *Maxwell* v. *Dow*, *supra*; *N. Y. Central R. Co.* v. *White*, 243 U. S. 188, 208; *Wagner Electric Co.* v. *Lyndon*, 262 U. S. 226, 232. Indictments by a grand jury may give way to informations by a public officer. *Hurtado* v. *California*, *supra*; *Gaines* v. *Washington*, 277 U. S. 81, 86. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. *Twining* v. *New Jersey*, *supra*. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. *Twining* v. *New Jersey*, *supra*; *Powell* v. *Alabama*, *supra*, pp. 68, 71; *Holmes* v. *Conway*, 241 U. S. 624. Cf. *Blackmer* v. *United States*, 284 U. S. 421, 440.

We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. Thus, the privilege to confront one's accusers and cross examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in

the federal courts (*Gaines* v. *Washington, supra,* at p. 85), and in prosecutions in the state courts is assured very often by the constitutions of the states. For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held. Cf. *Schwab* v. *Berggren,* 143 U. S. 442, 448, 450; *West* v. *Louisiana,* 194 U. S. 258; *Diaz* v. *United States,* 223 U. S. 442, 455; *Blackmer* v. *United States, supra. Hopt* v. *Utah,* 110 U. S. 574, has been distinguished and limited. *Frank* v. *Mangum, supra,* pp. 340, 341. Cf. *Patton* v. *United States,* 281 U. S. 276. Again, defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself. See *Lewis* v. *United States,* 146 U. S. 370, a prosecution in the federal courts. In such circumstances also we make a like assumption as to the scope of the privilege created by the federal constitution. *Diaz* v. *United States, supra.* No doubt the privilege may be lost by consent or at times even by misconduct. *Diaz* v. *United States, supra.* Cf. Sir James Fitzjames Stephen, Digest of the Law of Criminal Procedure, Art. 302. Our concern is with its extension when unmodified by waiver, either actual or imputed.

In all the cases thus assumed the presence of the defendant satisfies the test that was put forward a moment ago as basic and decisive. It bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend. No where in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. What has been said, if not decided, is distinctly to the contrary. *Howard* v. *Kentucky,* 200 U. S. 164, 175; *Valdez* v. *United States,* 244 U. S. 432, 445. Cf. *Frank* v. *Mangum, supra,* and particularly the dissenting opinion at p. 346. The underlying principle gains point and precision from the distinction everywhere drawn between proceedings at the trial and those before and after. Many motions before trial are heard in the defendant's absence, and many motions after trial or in the prosecution of appeals. Cf. *Schwab* v. *Berggren, supra,* and *Lewis* v. *United States, supra.* Confusion of thought will result

if we fail to mark the distinction between requirements in respect of presence that have their source in the common law, and requirements that have their source, either expressly or by implication, in the federal constitution. Confusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned. "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross examination." *Dowdell* v. *United States,* 221 U. S. 325, 330. See also Wigmore, Evidence, vol. 3, §§ 1395, 1397, collating the decisions. Nor has the privilege of confrontation at any time been without recognized exceptions, as for instance dying declarations or documentary evidence. *Dowdell* v. *United States, supra.* Cf. *Robertson* v. *Baldwin,* 165 U. S. 275, 282; *Motes* v. *United States,* 178 U. S. 458, 472, 473. The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule. *Commonwealth* v. *Slavski,* 245 Mass. 405, 415; cf. *West* v. *Louisiana, supra.* So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

We are thus brought to an inquiry as to the relation between the defendant's presence at a view and the fundamental justice assured to him by the Constitution of the United States.

At the outset we consider a bare inspection and nothing more, a view where nothing is said by any one to direct the attention of the jury to one feature or another. The Fourteenth Amendment does not assure to a defendant the privilege to be present at such a time. There is nothing he could do if he were there, and almost nothing he could gain. The only shred of advantage would be to make certain that the jury had been brought to the right place and had viewed the right scene. If he felt any doubt about this, he could examine the bailiffs at the trial and learn what they had looked at. The risk that they would lie is no greater than the risk that attaches to testimony about anything. "Constitutional law like other mortal contrivances has to take some chances." *Blinn* v. *Nelson,* 222 U. S. 1, 7. Here the chance is so remote that it dwindles to the vanishing point. If the bailiffs

were to beaf false witness as to the place they had shown, the lie would be known to the jury. There is no immutable principle of justice that secures protection to a defendant against so shadowy a risk. The argument is made that conceivably the place might have been changed and in a way that would be material. In that event the fact could be brought out by appropriate inquiry. There could be inquiry of witnesses in court and of counsel out of court. Description would disclose the conditions at the view, and the defendant or his witnesses could prove what the conditions were before. He could do nothing more though he had been there with the jury. Indeed the record makes it clear that upon request he would have been allowed to go there afterwards in company with his counsel. Opportunity was ample to learn whatever there was need to know.

If the risk of injustice to the prisoner is shadowy at its greatest, it ceases to be even a shadow when he admits that the jurors were brought to the right place and shown what it was right to see. That in substance is what happened here. On the trial, photographs and diagrams of the scene of the homicide were put in evidence by the Commonwealth and placed before the jury. There was no suggestion by the defendant or his counsel that these photographs and diagrams did not truly represent the place that had been seen upon the view. There was no suggestion of any change except the one that was conceded. The defendant took the stand and admitted that he was at the gasoline station at the time of the crime. He tried to reduce the grade of his wrongdoing by testifying that the shot had been fired by his codefendant Donnellon and that larceny, not robbery, was the aim of the conspiracy.* In the course of his testimony, he described his own and Donnellon's movements with the aid of the diagram in evidence. At the end of the trial he made a brief statement to the jury, supplementing the argument that had been made by his counsel. "I am sorry" he said, "that I had any part in the crime. I am sorry for the grief I have caused. But I did not fire the fatal shot. That

*Under the law of Massachusetts, homicide is murder in the first degree when committed "with deliberately premeditated malice aforethought" or in the commission or attempted commission of a crime that would be punishable, if there were no homicide, with imprisonment for life. Robbery by one armed with a dangerous weapon is a crime so punishable, but not larceny or attempted larceny. Mass. General Laws, c. 265, §§ 1 and 17.

is all." No where is there a suggestion of any doubt as to the place. Like concessions are implicit in the summing up of counsel. His argument reminds the jurors of what they had seen upon the view, and of the dimensions of the building, which are shown also on the diagram. The place is undisputed.

If it be true that there is no denial of due process as the result of a bare inspection in the absence of a defendant, the question remains whether such a denial results where counsel are permitted, without any statement of the evidence, to point out particular features of the scene and to request the jury to observe them. The courts of Massachusetts hold that statements, thus restricted, are proper incidents of a view. "The essential features may be pointed out by the counsel. No witnesses are heard . . . There can be no comment or discussion." *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 29: "One or two attorneys representing both the Commonwealth and the defendant go to the view, it being permissible to them, in the presence of each other and of the officers of the court, merely to point out to the jury 'marks, matters or things' but not otherwise to speak to the jury." *Ibid.* The rule in Massachusetts is that these acts are permissible though the defendant is not present (*Ibid*), and though he is kept away under protest. See *Commonwealth* v. *Belenski,* 276 Mass. 35, which was followed in the case at bar. *Commonwealth* v. *Snyder, supra.* We are to determine whether the Fourteenth Amendment prescribes anything to the contrary.

Obviously the difference between a view at which every one is silent and a view accompanied by a request to note this feature or another is one of degree, and nothing more. The mere bringing of a jury to a particular place, whether a building or a room or a wall with a bullet hole, is in effect a statement that this is the place which was the scene of the offense, and a request to examine it. When the tacit directions are made explicit, the defendant is not wronged unless the supplement of words so transforms the quality of the procedure that injustice will be done if the defendant is kept away. Statements to the jury pointing out the specific objects to be noted have been a traditional accompaniment of a view for about two centuries, if not longer. The Fourteenth Amendment has not displaced the procedure of the ages. *Corn Exchange Bank* v. *Coler,* 280 U. S. 218; *Ownbey* v. *Morgan,* 256 U. S. 94; *Twining* v. *New Jersey, supra,* at pp. 100, 101.

As early as 1747 there is the record of a precedent that exhibits the remedy in action. The practice then was to place the jury in the charge of "showers," who were sworn to lead them to the view. The defendant in a civil action complained that the plaintiff's shower had misbehaved himself in his comments to the jury. "The court discharged the rule, being of opinion the showers may show marks, boundaries, etc., to enlighten the viewers, and may say to them, 'These are the places which on the trial we shall adapt our evidence to.'" *Goodtitle* v. *Clark,* Barnes, 457. At that time views were not taken in criminal cases without the consent of both the parties, the Crown as well as the defendant, except, it seems, upon indictments for maintaining a nuisance. *Rex* v. *Redman,* 1756, 1 Kenyon 384; s. c. Sayer's. Rep. 303; *Commonwealth* v. *Handren,* 261 Mass. 294, 297; but see Anonymous, 1815, 2 Chitty 422. Cf. 1 Burr. Rep. 252. In 1825, however, a statute applicable to England and Wales supplied the defect of power, if defect there formerly had been. 6 George IV, c. 50, s. 23. Thereafter, in any case, "either civil or criminal," a view might be ordered in the discretion of the court. The form of oath administered to the showers appears in the reports. Thus, in *Regina* v. *Whalley,* 1847, 2 Cox Crim. Reports 231, the oath administered was this: "You swear you will attend this jury and well and truly point out to them the place in which the offence for which the prisoner T. W. stands charged is alleged to have been committed; you shall not speak to them touching the supposed offence whereof the said T. W. is so charged, only so far as relates to describing the place aforesaid." See also *R.* v. *Martin,* L. R., 1 Crown Cases Reserved 378; Tidd's Practice,. vol. 2, pp. 797, 798; Gude's Crown Practice, London, 1828, vol. 2, pp. 655, 656; cf. Wigmore, Evidence, vol. 3, §§ 1802, 1803, and cases cited. So also in our own country, the power to order a view in criminal cases has been made certain by statutes enacted in nearly all the states (see the statutes collated in Wigmore on Evidence, vol. 2, § 1163), though there are instances in which the power has been treated as inherent. *State* v. *Perry,* 121 N. C. 533; *Commonwealth* v. *Knapp,* 9 Pick 496, 515. The statutes, when enacted, conform very generally to the practice in the English courts, provision being made for the presence of the judge, or, in his discretion, for the appointment of showers sworn in the ancient form. Cf. the

statutes and decisions in Wigmore, Evidence, vol. 3, §§ 1802, 1803, and vol. 2, § 1163; and see *Brooklyn* v. *Patchen,* 3 Wend. 47, 65; *State* v. *Perry, supra,* at p. 536.

When the scene is explained by showers who are not the counsel for the parties, a defendant gains nothing by being present at a view any more than he gains where there is only a bare inspection without an explanatory word. He has no privilege in such circumstances, and certainly no constitutional privilege, to speak to the showers and give suggestions or advice. "We do not see what good the presence of the prisoner would do, as he could neither ask nor answer questions, nor in any way interfere with the acts, observations or conclusions of the jury." *People* v. *Bonney,* 19 Cal. 426, 446. If they fail to point out anything material, he may prove the fact upon the trial and ask for another view. He had the same privilege here, for there was a stenographic transcript of all that was said and done. Never, at any stage of the proceeding, has there been a suggestion by the defendant or his counsel that there was need of something more.

The situation is not changed to his prejudice because the showers in this instance were the counsel for the parties. The choice of counsel for that purpose has its roots in ancient practice. Tidd's Practice, vol. 2, pp. 797, 798; Wigmore, Evidence, vol. 3, §1803; cf. 1 Burr. 252. Far from being harmful, it supplies an additional assurance that nothing helpful to either side will be overlooked upon the view. True, indeed, it is that when counsel are the showers, the defendant may be able, if he is present, to give suggestion or advice, or so at least we may assume. Constitutional immunities and privileges do not depend upon these accidents. The Fourteenth Amendment does not say that showers are at liberty in the absence of the defendant to point out the things to be viewed if the showers are not counsel, but are not at liberty to do so if they happen to be counsel. The least a defendant must do, if he would annul the practice upon a view which the Commonwealth has approved by the judgment of its courts, is to show that in the particular case in which the practice is exposed to challenge, there is a reasonable possibility that injustice has been done. Cf. *Rutherford* v. *Commonwealth,* 78 Ky. 639; *Howard* v. *Kentucky, supra.* No one can read what was said at this view in the light of the uncontroverted facts established

at the trial, and have even a passing thought that the presence of Snyder would have been an aid to his defense.

There is an approach to the subject from the viewpoint of history that clarifies the prospect. We may assume that the knowledge derived from an inspection of the scene may be characterized as evidence. Even if this be so, a view is not a "trial" nor any part of a trial in the sense in which a trial was understood at common law. This is seen from two circumstances: In the first place the judge is not required to be present at a view, though he may go there if he will. In the second place, the practice for many years was to have a committee of the jurors, the usual number being six, attend at the view to represent the whole body. See the rules laid down by Lord Mansfield in 1 Burr. Rep. 252: also the provisions of the Act of 6 George IV, c. 50, §§ 23, 24 [1825], by which the practice was made uniform in criminal and civil cases: and compare Wigmore, Evidence, vol. 2, § 1165, and the cases cited. We have no thought to suggest that a view by a part of a jury is permissible today. That question is not before us. There is significance, none the less, in the fact that it was permissible in England, the home of the principle that a defendant charged with felony has the privilege of confronting his accusers and of being present at his trial. Certain it is that in the land where these maxims had their genesis and from which they were carried to our shores, the proceeding known as a trial was thought of as something very different from the proceeding known as a view. To transfer to a view the constitutional privileges applicable to a trial is to be forgetful of our history.

A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence. A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel (*Powell* v. *Alabama, supra*), and cross examine his accusers. *Dowdell* v. *United States, supra; Commonwealth* v. *Slavski, supra.* Cf. *Felts* v. *Murphy*, 201 U. S. 123. Let the words "evidence" and "trial" be extended but a little, and the privilege will apply to stages of

the cause at which the function of counsel is mechanical or formal and at which a scene and not a witness is to deliver up its message. In such circumstances the solution of the problem is not to be found in dictionary definitions of evidence or trials. It is not to be found in judgments of the courts that at other times or in other circumstances the presence of a defendant is a postulate of justice. There can be no sound solution without an answer to the question whether in the particular conditions exhibited by the record the enforced absence of the defendant is so flagrantly unjust that the Constitution of the United States steps in to forbid it. What we are subjecting to revision is not the action of a legislature excluding a defendant from a view at all times or in all conditions. What is here for revision is the action of the judicial department of a state excluding the defendant in a particular set of circumstances, and the justice or injustice of that exclusion must be determined in the light of the whole record. Cf. *Howard* v. *Kentucky, supra; Chicago, Burlington & Quincy Railroad Co.* v. *Chicago,* 166 U. S. 226, 234, 235. Discretion has not been abdicated. To the contrary, the record makes it clear that discretion has been exercised. Much is made of a supposed analogy between a view and a photograph, but the analogy, whatever its superficial force, is partial and misleading. The photograph to be admissible should be verified by the oath of the photographer, who must be subject to cross examination as to the manner of its taking. It is common knowledge that a camera can be so placed, and lights and shadows so adjusted, as to give a distorted picture of reality. Nor is there need for us to hold that conditions can never arise in which justice will be outraged if there is a view in the defendant's absence. Enough for present purposes that they have not arisen here. "A statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Du Pont* v. *Commissioner,* 289 U. S. 685, 588. If this is true of the action of the legislative department of the state laying down a general rule, it is even more plainly true of the action of judicial or administrative officers dealing only with the instance. Cf. *Nectow* v. *Cambridge,* 277 U. S. 183. We view the facts in their totality.

True indeed it is that constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry

whether prejudice to a defendant has been wrought through their denial. In saying this we put aside cases within the rule of *de minimis*. If the defendant in a federal court were to be denied the opportunity to be confronted with the "witnesses against him," the denial of the privilege would not be overlooked as immaterial because the evidence thus procured was persuasive of the defendant's guilt. In the same way, privileges, even though not explicit, may be so obviously fundamental as to bring us to the same result. A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, however convincing the *ex parte* showing. But here, in the case at hand, the privilege, if it exists, is not explicitly conferred, nor has the defendant been denied an opportunity to answer and defend. The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall." *Ownbey* v. *Morgan, supra,* p. 110. What is fair in one set of circumstances may be an act of tyranny in others. This court has not yet held that even upon a trial in court the absence of a defendant for a few moments while formal documents are marked in evidence will vitiate a judgment.* Cf. *Commonwealth* v. *Kelly,* 292 Pa. 418. But we do not need to dwell upon the measure of

*What was said in Hopt *v.* Utah, *supra,* and Schwab *v.* Berggren, *supra,* on the subject of the presence of a defendant was dictum, and no more. See p. 4, *ante,* of this opinion. We may say the same of Lewis *v.* United States, *supra,* with the added observation that it deals with the rule at common law and not with constitutional restraints.

There are decisions in the state courts that a conviction will stand even though rulings have been made by the trial court in the absence of the defendant if it appears that they could not by any possibility have resulted to his hurt. Whittaker *v.* State, 173 Ark. 1172; Lowman *v.* State, 80 Fla. 18. The Supreme Court of Pennsylvania held in Commonwealth *v.* Kelly, *supra,* that the burden was on the defendant to show a probability of injury.

the privilege at such a time or in such conditions. Whatever it may be, not even an intimation will be found in our decisions that there is a denial of due process if the accused be excluded from a view, though present at every stage of the proceedings in the court. It is one thing to say that the prevailing practice is to permit the accused to accompany the jury, if he expresses such a wish. It is another thing to say that the practice may not be changed without a denial of his privileges under the Constitution of the United States. To hold this in the light of the historic concept of a view as something separate from a trial in court and in the light of the shadowy relation between the defendant's presence at such a time and his ability to defend, is to travel far away from the doctrine of *Hurtado* v. *California* and *Twining* v. *New Jersey*.

One episode at the view must have a word of criticism. The statement by the judge that one of the three pumps was not there at the homicide goes beyond the bounds of explanation appropriate for showers. No objection on this score was made by the defendant, though he had or could have had the minutes of the proceeding. The blunder did not harm him, for there is no hint in all the evidence that the presence or absence of the pump had any bearing on the verdict. The situation is much the same as in cases where there has been misconduct by the jury. The verdict is not upset for such a cause, if there was no substantial harm. *People* v. *Johnson*, 110 N. Y. 134, 144; *People* v. *Dunbar Contracting Co.*, 215 N. Y. 416, 426; *United States* v. *Davis*, 103 Fed. 457, 467. But there is another answer more convincing, if these are insufficient. After returning from the view, the District Attorney offered in evidence a diagram of the station, and said to the jury, "It is agreed that this third pump was not there at the time of the offense." To this, defendant and his counsel gave assent by acquiescence. In effect the agreement was thus renewed and confirmed as if then made for the first time. The defendant was not hurt because it had been made once before.

Whether a defendant must be present at a view has been considered in the state courts with varying conclusions. Nearly always the argument has been directed to the local constitutions, generally to a provision that the accused must be confronted with the witnesses against him, sometimes a specific mandate that he be present at the trial. Never, so far as our search of the books informs us, has the privilege been established in opposition to the

local practice as an essential condition of due process under the federal constitution. Some courts have put their decision on the ground that a view is part of the trial. *State* v. *McGinnis*, 12 Idaho 336; *Freeman* v. *Commonwealth*, 226 Ky. 850; *Noell* v. *Commonwealth*, 135 Va. 600, 619; *Benton* v. *State*, 30 Ark. 328, 350. Others have held that it is not. *People* v. *Thorn*, 156 N. Y. 286; *State* v. *Rogers*, 145 Minn. 303; *Washington* v. *State*, 86 Fla. 533; *State* v. *Mortensen*, 26 Utah 312; cf. *State* v. *Congdon*, 14 R. I. 458, 463; *State* v. *Hilsinger*, 167 Wash. 427, 437, 438. A trial, they remind us, is appointed to be held in a court house or a place designated by statute with a judge or magistrate presiding. *People* v. *Thorn*, at p. 297. A view may be had anywhere. Some courts, placing the emphasis on the privilege of confrontation have thought that a view is equivalent to an examination of a witness, and that the privilege of attendance may not even be waived. *Noell* v. *Commonwealth, supra; State* v. *McCausland*, 82 W. Va. 525; *Benton* v. *State, supra; Foster* v. *State*, 70 Miss. 755; *State* v. *Stratton*, 103 Kan. 226. Other courts have held, and plainly with the better reason, that physical objects are not witnesses, even though they have the quality of evidence, and that the defendant is at liberty to waive the privilege to view them, if such a privilege exists. *People* v. *Thorn, supra; Elias* v. *Territory*, 9 Arizona 1; *Blythe* v. *State*, 47 Ohio 234; *State* v. *Hartley*, 22 Nev. 342; *State* v. *Buzzell*, 59 N. H. 65. Cf. *Patton* v. *United States, supra.** Still others, though conceding the possibility of waiver, uphold the privilege to be present if due demand is made. *People* v. *Bush*.

*Cases relating to the procedure at a view are not to be confused with cases where the defendant was absent during the examination of witnesses or the charge of the judge. Examples of such cases are Slocovitch *v.* State, 46 Ala. 227; People *v.* Beck, 305 Ill. 593; State *v.* Hutchinson, 163 La. 146; Duffy *v.* State, 151 Md. 456; State *v.* Jackson, 88 Mont. 420; State *v.* Dixon, 185 N. C. 727; State *v.* Schasker, 60 N. D. 462; State *v.* Chandler, 128 Ore. 204. In most, if not all, there was an express statutory or constitutional requirement of presence at the trial, a requirement so clear as to leave little room for construction. One court has gone so far as to require the presence of the defendant upon a motion for a new trial (State *v.* Hoffman, 78 Mo. 256), in opposition to the judgments of this court in Schwab *v.* Berggren and Lewis *v.* United States, *supra*.

As to the rule where the crime is of the grade of a misdemeanor only, see United States *v.* Santos, 27 Fed. Cas. 954; United States *v.* Shelton, 6 F. (2d) 897; Gray *v.* State, 158 Tenn. 370. Cf. Hopt *v.* Utah, *supra*, at p. 576.

68 Cal. 623; *People* v. *Auerbach,* 176 Mich. 23; *Carroll* v. *State,* 5 Neb. 31; *State* v. *Hilsinger, supra; Sasse* v. *State,* 68 Wis. 530; *Chance* v. *State,* 156 Ga. 428; *People* v. *Palmer,* 43 Hun. 397. Massachusetts takes the position that waiver is unnecessary and that the defendant may be excluded in the discretion of the judge. *Commonwealth* v. *Belenski, supra; Commonwealth* v. *Snyder, supra.* So also does Minnesota. *State* v. *Rogers, supra.* In none of the cases where the privilege was upheld did the defendant make the claim that there had been an infringement of his rights under the Fourteenth Amendment.

The decisions in the federal courts are, none of them, controlling. *Howard* v. *Kentucky, supra,* sustained a judgment of conviction against the claim of a denial of due process where the court in the absence of the defendant had discharged a juror for misconduct, and substituted another. There was evidence, however, leading to an inference of waiver by the defendant and his counsel. *Diaz* v. *United States,* 223 U. S. 442, had to do with the privilege of confrontation, and drew an inference of waiver where the defendant had wilfully absented himself after the trial had been begun. Cf. Sir James Fitzjames Stephen, Digest of the Law of Criminal Procedure, Art. 302; *Smellie's Case,* 14 Crim. App. Reports 128. *Frank* v. *Mangum, supra,* found a waiver of the privilege of presence at the rendition of the verdict. None of these cases was concerned with the procedure at a view. *Valdez* v. *United States, supra,* considered a provision of the Philippine Code which confers the privilege of confrontation, and held that consistently therewith the scene of the crime might be viewed by the judge with the consent of the defendant's counsel, though without the knowledge of the client. The court added that "apart from any question of waiver" it would be pressing the privilege of confrontation too far to apply it in such circumstances, and moreover that in the circumstances of the case, the absence of the defendant was plainly immaterial, it "being difficult to divine how the inspection . . . added to or took from the case as presented."

We find it of no moment that the judge in this case described the view as evidence. The Supreme Judicial Court of Massachusetts has said of a view that "its chief purpose is to enable the jury to understand better the testimony which has or may be introduced." *Commonwealth* v. *Dascalakis, supra.* Even so, its in-

evitable effect is that of evidence, no matter what label the judge may choose to give it. *Commonwealth* v. *Handren, supra.* Such is the holding of many well considered cases. Wigmore, vol. 2, § 1168, pp. 705 *et seq.*, vol. 3, §§ 1802, 1803, collating the decisions. To say that the defendant may be excluded from the scene if the court tells the jury that the view has no other function than to give them understanding of the evidence, but that there is an impairment of the constitutional privileges of a defendant thus excluded if the court tells the jury that the view is part of the evidence,—to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them.

The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwelath expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis* v. *Parker,* 187 U. S. 606, 609), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

The judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 241.—October Term, 1933.

Herman Snyder, Petitioner,
vs.
Commonwealth of Massachusetts.

On Writ of Certiorari to the Superior Court in and for the County of Middlesex, Commonwealth of Massachusetts.

[January 8, 1934.]

Mr. Justice Roberts.

The petitioner and two others were charged with murder committed in an attempt to rob a gasoline station. The petitioner and one of his co-defendants were tried together; the third testified for the Commonwealth.

There is no dispute that when the three embarked on their evil enterprise all were armed, and it is not denied that they approached the station with intent to commit either larceny or robbery; but the record exhibits grave contradictions as to which of them fired the fatal shot, and as to the petitioner's abandonment of the common plan before the shot was fired. The situation and size of the station, its arrangement, its contents, the location and size of doors and windows, and the position of surrounding objects, were vital factors in corroboration or contradiction of the varying accounts given in the testimony of the three participants.

After the jury had been empaneled and sworn the district attorney moved for a view of the scene of the murder. The request was granted. The district attorney then made a short statement to the jury, telling them they were to view the premises and that when they returned from the view he would make a fuller opening. In the course of a colloquy between counsel and the judge the latter announced that he would appoint the defendants' counsel to go on the view as representing their respective clients. Counsel for the petitioner moved that his client be permitted to accompany the jury on the view, asserting this was the defendant's right under

the federal constitution. The motion was denied and an exception reserved to the ruling.

The judge, the official stenographer, the district attorney, and counsel for the defendants, accompanied the jury to the scene. The judge controlled the entire proceeding, and everything that was said or done was taken by the stenographer and made a part of the record of the trial. The pointing out of features of the scene by the district attorney went beyond a mere showing, and what he said closely approached argument.[1] During the progress of the view the court formulated and placed of record a stipulation as to changes which had occurred since the shooting.[2] In his charge to the jury the judge said:

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[1]The following are outstanding instances:

"The Court: Now, Mr. Volpe, if you are ready.

"Mr. Volpe: Just first stand here, gentlemen, and take a look inside of the gasoline station. Now step in, please.

"(The following occurred inside the filling station:)

"Mr. Volpe: Now, gentlemen, I call your attention to this glass here (indicating), this window (indicating the back window of the filling station,) about the position of the glass, and I ask you to look at that, and the relative position of the entrance, especially to the right or to the left, coming in through the door. And then this oil tank here on the right of this window; the other two windows on the right of the building, and I want you to take note of the size of the room, and this telephone here, and these two doors, one on each side of the telephone. Take note, also, of the location of this other gas tank over here, back of the door; this desk on the left. Also look out the window at the back, and notice the gravel in the yard, and the fence there."

. . . . . .

"Mr. Volpe: I want you to take a view of the other side of the sidewalk from this location, and note the driveway on the right of the gas station, and on the left, and these two pumps, or three pumps, noticing the distance from the pumps on the entrance of the gas station.

"Now, I would like to have you come over here and take a look at the gas station as it sits back there.

"(The jury were taken across the street to the opposite sidewalk.)

"Mr. Volpe: I want you to get a look at the whole layout, the righthand entrance and the lefthand entrance over there, where that car is standing. Take particular notice of the width of this street, and, as you stand here, notice the bridge going towards Union Square, with the right and left driveways."

[2]What occurred is shown by the notes as follows:

"Mr. Volpe: That middle pump wasn't there at the time.

"The Court: It is agreed that the only pumps that were there were the two outside pumps, and that the middle, or blue one, was not there.

"Now, what have you before you on which to form your judgment and to render your finding and verdict? The view, the testimony given by the witnesses, and the exhibits, comprise the evidence in this case, comprise the evidence that is before you."[3]

"As I say, it is for the jury to say, from all the evidence before you, taking into consideration what it is contended outside of the evidence that you have relative to the firing of any shot—the conduct of any of the parties just before and just after, and any appearances or any evidence that you may gather from the appearance of the locality itself, the testimony relative to the result of the shot, the course of it, and what was done. All that is a part of the surrounding evidence and the circumstances that you shall take into consideration. And then, having taken all the surrounding circumstances into consideration, it is for you to say from all the evidence before you, whether or not it was a withdrawal."[3]

In Massachusetts what the jury observes in the course of a view is evidence in the cause. In *Tully* v. *Fitchburg R. R.*, 134 Mass. 499, 503, it was said:

"In many cases, and perhaps in most, except those for the assessment of damages, a view is allowed for the purpose of enabling the jury better to understand and apply the evidence which is given in court; but it is not necessarily limited to this; and, in most cases of a view, a jury must of necessity acquire a certain amount of information, which they may properly treat as evidence in the case."

And in *Commonwealth* v. *Pascalakis*, 246 Mass. 12, 29-30, a prosecution for homicide, the Supreme Judicial Court held:

"The things thus seen by the jurors could not well be banished from their minds. A view often dispenses with the necessity of

"Mr. Volpe: Yes, your Honor.

"The Court: I can state that to them.

"(The jury left the bus and assembled on the sidewalk.)

"The Court: Now, it is agreed that at the time of the offense,—that is, on April 9, 1931,—there were but two pumps in front of the gasoline station, the one on the extreme right, that is painted green, and the one on the extreme left, that is painted black. Those two were there. The one in the middle, with the blue striping on it, was not there. It is also suggested that the jurors look at the street lights from that corner down there (indicating), and the situation of those lights and those down the street."

[3]During the trial, when certain plans were being put in evidence, the judge said: "What they [the jury] saw is to be taken equally with any evidence that is before them."

detailed description by plan or word of mouth. Inevitably that which the jury see on a view will be utilized in reaching a verdict. In that sense that which is disclosed on a view is evidence. It is rightly described as such. Expressions to that effect are in numerous decisions."

In *Commonwealth* v. *Handren*, 261 Mass. 294, 297, the court observed:

"And the knowledge which the jurors thus acquire is evidence in the case."

Of such weight is the knowledge thus obtained that it may tip the scales in favor of the sufficiency of the evidence to sustain a verdict. Thus in *Hanks* v. *B. & A. R. R.*, 147 Mass. 495, 499, where the question was whether the case ought to have been submitted to the jury or a binding direction given, it was said:

"It is to be observed that the jury may have been materially aided by a view taken by them of the locality."

Compare *Smith* v. *Morse*, 148 Mass. 407, 410.

It necessarily follows that the court may instruct the jury to take into consideration what they saw. In *Commonwealth* v. *Mara*, 257 Mass. 198, 209, the ruling was:

"There was no error in the part of the instructions which permitted the jury to consider in deciding this question what they observed on the view."

And in *Commonwealth* v. *Mercier*, 257 Mass. 353, 365, this was said:

"The defendant also excepted to the statement by the trial judge to the jury that what they would see on the view would be competent evidence for them to consider. . . . There was no error in the statement of the judge as to the right of the jury to consider as evidence what was seen by them on the view."

In the light of these rulings, which were concretely applied in this case, the question is whether the denial of petitioner's request to be present at the view deprived him of the due process guaranteed by the Fourteenth Amendment. This court has never had occasion to pass upon the precise point; but many pronouncements regarding the requirements of due process seem to leave no doubt as to the proper resolution of the issue.

The concept of due process is not technical. Form is disregarded if substantial rights are preserved.[4] In whatsoever pro-

[4] *Hurtado* v. *California*, 110 U. S. 516, 524, 532; *Louisville & Nashville Rd. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Simon* v. *Craft*, 182 U. S. 427, 436; *Holmes* v. *Conway*, 241 U. S. 624.

ceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life. It is fundamental that there can be no due process without reasonable notice and a fair hearing.[5] Though the usual and customary forms of procedure be disregarded, the hearing may nevertheless be fair, if it safeguards the defendant's substantial rights.

The States need not adopt a particular form of accusation,[6] or prescribe any one method of trial,[7] or adhere to any set mode of selecting the triers of fact.[8] To conform to modern conditions, they may substitute a new form of procedure for one long practised and recognized.[9] But, whatever the form or method of procedure adopted, they remain always subject to the prohibition against that which is commonly thought essentially unfair to him who is to be afforded a hearing. Tested by this principle the trial of an issue beyond the claim asserted,[10] the participation of a judge affected with a personal interest in the result,[11] the forcing of a trial under pressure of mob domination,[12] or the deprivation of the right to present evidence bearing on the issue,[13] have been adjudged to deny due process. And this court has recently decided that in the trial of a capital offense due process includes the right of the accused to be represented by counsel.[14]

Our traditions, the Bills of Rights of our federal and state constitutions, state legislation and the decisions of the courts of the nation and the states, unite in testimony that the privilege of the

[5] *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 708; *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Twining* v. *New Jersey*, 211 U. S. 78, 111.

[6] *Hurtado* v. *California*, *supra*; *Caldwell* v. *Texas*, 137 U. S. 692; *Bolln* v. *Nebraska*, 176 U. S. 83; *Barrington* v. *Missouri*, 205 U. S. 483.

[7] *Walker* v. *Sauvinet*, 92 U. S. 90; *Maxwell* v. *Dow*, 176 U. S. 581; *Jordan* v. *Massachusetts*, 225 U. S. 167.

[8] *Brown* v. *New Jersey*, 175 U. S. 172; *Howard* v. *Kentucky*, 200 U. S. 164; *Rawlins* v. *Georgia*, 201 U. S. 638.

[9] *Hurtado* v. *California*, *supra*, 528, 529; *Twining* v. *New Jersey*, *supra*, 111.

[10] *Windsor* v. *McVeigh*, 93 U. S. 274, 282; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281-2.

[11] *Tumey* v. *Ohio*, 273 U. S. 510.

[12] *Moore* v. *Dempsey*, 261 U. S. 86.

[13] *Saunders* v. *Shaw*, 244 U. S. 317.

[14] *Powell* v. *Alabama*, 287 U. S. 45.

accused to be present throughout his trial is of the very essence of due process. The trial as respects the prisoner's right of presence in the Constitutional sense, does not include the formal procedure of indictment or preliminary steps antecedent to the hearing on the merits, or stages of the litigation after the rendition of the verdict,[15] but does comprehend the inquiry by the ordained trier of fact from beginning to end.[16]

Speaking generally of the administration of criminal justice throughout the nation, this court has said:[17] "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner;" and in enforcing the mandate of a territorial statute this language was used:[18]

"Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

To allay the apprehensions of the people lest the federal government invade their liberties, the first ten amendments to the Constitution were adopted. The Sixth assures one accused of crime that if prosecuted under federal law he shall have a public trial, be informed of the nature and cause of the accusation, be confronted with the witnesses against him, and have the assistance of counsel for his defense. But the purpose that all trials, in state as well as national tribunals, should not lack the same quality of fairness, is evidenced by the embodiment of a guarantee of similar import in the constitution of every state in the Union.[19]

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[15] *Schwab* v. *Berggren*, 143 U. S. 442; *Dowdell* v. *United States*, 221 U. S. 325, 331.

[16] *Hopt* v. *Utah*, 110 U. S. 574; *Lewis* v. *United States*, 146 U. S. 370; *Diaz* v. *United States*, 223 U. S. 442.

[17] *Lewis* v. *United States, supra*, p. 372.

[18] *Hopt* v. *Utah, supra*, p. 579.

[19] In two States (California and Nevada) the constitutions omit reference to the right of the accused to confront the witnesses against him; but the

Out of excess of caution the fundamental law of many of the States specifically safeguards the right of the accused, "to appear and defend in person".[20] But mere differences in phraseology have not obscured the fact that all these instruments were intended to secure the same great privilege—a fair hearing. Accordingly, the courts have uniformly and invariably held that the Sixth Amendment, as respects federal trials, and the analogous declarations of right of the state constitutions touching trials in state courts, secure to the accused the privilege of presence at every stage of his trial. This court has so declared. In commenting upon the section of the Philippine Civil Government Act which extends to the accused in all criminal prosecutions "the right to be heard by himself and counsel", this was said:

"An identical or similar provision is found in the constitutions of the several States, and its substantial equivalent is embodied in the Sixth Amendment to the Constitution of the United States. . . . In cases of felony our courts, with substantial accord, have regarded it [the right so granted] as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself."[21]

And, as if to make assurance doubly sure, the legislatures of many of the States have adopted statutes redundant to the constitutional mandate explicitly declaring the right of the accused to be present at his trial.[22]

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omission is supplied by statute: Cal. Stats. 1911, Ch. 187, p. 364, Penal Code, § 686; Nevada Compiled Laws, 1929, Vol. 5, § 10654.

[20]Arizona, Const. of 1910, Art. II, Sec. 24; California, Const. of 1879, Art. I, Sec. 13; Colorado, Const. of 1876, Art. II, Sec. 16; Idaho, Const. of 1889, Art. I, Sec. 13; Illinois, Const. of 1870, Art. 2, Sec. 9; Kansas, Const. of 1859, Bill of Rights, Sec. 10; Missouri, Const. of 1875, Art. II, Sec. 22; Montana, Const. of 1889, Art. III, Sec. 16; Nebraska, Const. of 1875, Art. I, Sec. 11; Nevada, Const. of 1864, Art. I, Sec. 8; New Mexico, Const. of 1911, Art. II, Sec. 14 (as amended); New York, Const. of 1894, Art. I, Sec. 6; North Dakota, Const. of 1889, Art. I, Sec. 13; Ohio, Const. of 1851, (as amended Sept. 3, 1912), Art. I, Sec. 10; South Dakota, Const. of 1889, Art. VI, Sec. 7; Utah, Const. of 1895, Art. I, Sec. 12; Washington, Const. of 1889, Art. I, Sec. 22; Wyoming, Const. of 1889, Art. I, Sec. 10.

[21]*Diaz* v. *United States, supra,* p. 454.

[22]La. Code Crim. Proc. (Dart 1932), Art. 365. Ann. Laws of Mass., Vol. 9, Ch. 278, § 6; Comp. Laws Michigan, 1929, Vol. 3, Ch. 287, § 17129; Revised Codes of Montana, 1921, Vol. 4, Part. II, Ch. 1, § 11611; Nevada Comp.

In the light of the universal acceptance of this fundamental rule of fairness that the prisoner may be present throughout his trial, it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule.

It has been urged that the prisoner's privilege of presence is for no other purpose than to safeguard his opportunity to cross-examine the adverse witnesses. But the privilege goes deeper than the mere opportunity to cross-examine, and secures his right to be present at every stage of the trial. The cases cited in the margin,[23] while by no means exhausting the authorities, sufficiently illustrate and amply sustain the proposition that the right is fundamental and assures him who stands in jeopardy that he may in person, see, hear and know all that is placed before the tribunal having power by its finding to deprive him of liberty or life. It would be tedious and unnecessary to quote the language used in vindication of the privilege. The books are full of discussions of the subject.

The accused cannot cross-examine his own witnesses. Will it be suggested that, for this reason, he may be excluded from the court room while they give their evidence? He cannot cross-examine documents or physical exhibits. But documents, plans, maps, photographs, the clothing worn by the victim and by the perpetrator of the alleged crime, the weapon used, and other material objects may be more potent than word of mouth, to carry conviction to the jury's minds; and, so of the physical appearance of

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Laws, 1929, Vol. 5, § 10654, § 10921; New York Code of Crim. Proc., Cahill, § 8, par. 2; No. Dak. Comp. Laws, 1913, Vol. 2, § 10393; Code of Laws of South Carolina, 1932, § 996; Vermont General Laws 1917, § 2496; Virginia Code of 1930, § 4894; Pierce's Washington Code, § 1086-324; Wisconsin Statutes 1931, § 357.07; Wyoming Revised Statutes, 1931, § 33-903.

[23] *Slocovitch* v. *State*, 46 Ala. 227; *Whittaker* v. *State*, 173 Ark. 1172; *Lowman v. State*, 80 Fla. 18; *Chance* v. *State*, 156 Ga. 428; *People* v. *Beck*, 305 Ill. 593; *Batchelor* v. *State*, 189 Ind. 69; *State* v. *Reidel*, 26 Iowa 430; *Riddle* v. *Comm.*, 216 Ky. 220; *State* v. *Hutchinson*, 163 La. 146; *Duffy* v. *State*, 151 Md. 456; *Comm.* v. *Cody*, 165 Mass. 133; *State* v. *Dingman*, 177 Minn. 283; *Foster* v. *State*, 70 Miss. 755; *State* v. *Hoffman*, 78 Mo. 256; *State* v. *Jackson*, 88 Mont. 420; *Miller* v. *State*, 29 Neb. 437; *State* v. *Duvel*, 103 N. J. 715; *People* v. *Perkins*, 1 Wendell 91; *State* v. *Dixon*, 185 No. Car. 727; *State* v. *Schasker*, 60 N. D. 462; *Cole* v. *State*, 35 Okla. Cr. Rep. 50; *State* v. *Chandler*, 128 Oreg. 204; *Gray* v. *State*, 158 Tenn. 370; *Schafer* v. *State*, 118 Tex. Cr. Rep. 500; *State* v. *Mannion*, 19 Utah 505; *Palmer* v. *Comm.*, 143 Va. 592; *State* v. *Shutzler*, 82 Wash. 365; *State* v. *Howerton*, 100 W. Va. 501.

the scene of the crime. No reason is apparent why, if the accused may be excluded from a view, he may not also be excluded from the court room while such documentary and physical evidence is proffered to and examined by the jury. The opportunity for cross-examination of witnesses is only one of many reasons for the defendant's presence throughout the trial. In no State save in the Commonwealth of Massachusetts, and in no cases save in those there recently decided, has the privilege or the fundamental nature of the right it preserves been questioned or denied. As the cases show,[24] the right of presence exists at every step in the trial, whether it be during the giving of oral testimony, the submission of a document, the presentation of physical exhibits, the argument of counsel, the charge of the court, or the rendition of the verdict.

It cannot successfully be contended that as the Sixth Amendment has no application to trials in state courts, and the Fourteenth does not draw to itself and embody the provisions of state constitutions (*Patterson* v. *Colorado*, 205 U. S. 454), the due process secured by the Fourteenth Amendment does not embrace a right secured by those instruments. In *Powell* v. *Alabama*, *supra*, the argument that the conclusion would be difficult that the right to counsel specifically preserved by the Sixth Amendment was also within the intendment of the due process clause of the Fourteenth, was answered thus:

"In . . . *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U. S. 226, 241, this court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation. This holding was followed in *Norwood* v. *Baker*, 172 U. S. 269, 277; *Smyth* v. *Ames*, 169 U. S. 466, 524; and *San Diego Land Co.* v. *National City*, 174 U. S. 739, 754.

"Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment, although in the First Amendment. Congress is prohibited in specific terms from abridging the right. *Gitlow* v. *New York*, 268 U. S. 652, 666; *Stromberg* v. *California*, 283 U. S. 359, 368; *Near* v. *Minnesota*, 283 U. S. 697, 707.

" . . . . The rule is an aid to construction, and in some instances may be conclusive; but it must yield to more compelling

[24]See the cases cited in notes 16 and 23.

considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (*Hebert* v. *Louisiana*, 272 U. S. 312, 316), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution.'' (pp. 66, 67.)

If, then, a view of the premises where crime is alleged to have been committed is a part of the process of submission of data to the triers of fact, upon which judgment is to be founded; if the knowledge thereby gained is to play its part with oral testimony and written evidence in striking the balance between the state and the prisoner, it is a part of the trial. If this is true the Constitution secures the accused's presence. In this conclusion all the courts, save those of Massachusetts, agree. Such difference of view as the authorities exhibit as to the prisoner's right to be present at a view arises out of a disagreement on the question whether the view is a part of the trial, whether it is, in effect the taking of evidence. The great weight of authority is that it forms a part of the trial, and for that reason a defendant who so desires is entitled to be present.[25] Many decisions hold that he may waive the privilege;[26] but an examination of the cases discloses none (with a single possible exception) where a denial of his request to accompany the jury on the view has not been held reversible error. And the statements that a view is not a part of the trial or that it is not the taking of evidence, and denying, on that ground, the defendant's right to be present, are invariably found in cases where the defendant requested the view and did not ask to accompany the jury, or waived either expressly or by conduct his right so to do. Such statements are dicta, since the accused waived whatever right he had. Moreover, in several of the opinions which deny the right it is said that the prisoner ought always to be allowed to accompany the jury if he so requests.[27]

[25] *Benton* v. *State*, 30 Ark. 328; *People* v. *Bush*, 68 Cal. 623; 71 Cal. 602; *Washington* v. *State*, 86 Fla. 533; *Chance* v. *State*, 156 Ga. 428; *State* v. *McGinnis*, 12 Idaho 336; *Freeman* v. *Comm.*, 226 Ky. 850; *State* v. *Bertin*, 24 La. Ann. 46; *People* v. *Auerbach*, 176 Mich. 23, 45 (semble); *Bailey* v. *State*, 147 Miss. 428; *Carroll* v. *State*, 5 Neb. 31; *Colletti* v. *State*, 12 Oh. App. 104; *Watson* v. *State* (Tenn.), 61 S. W. (2d) 476; *State* v. *Mortensen*, 26 Utah 312; *Noell* v. *Comm.*, 135 Va. 600; *State* v. *Hilsinger*, 167 Wash. 427; *State* v. *McCausland*, 82 W. Va. 525.

[26] *Whitley* v. *State*, 114 Ark. 243; *People* v. *Searle*, 33 Cal. App. 228; *Haynes* v. *State*, 71 Fla. 585; *State* v. *Stratton*, 103 Kan. 226; *State* v. *Hartley*, 22 Nev. 342; *Colletti* v. *State*, 12 Oh. App. 104; *Starr* v. *State*, 5 Okla. Cr. Rep. 440; *State* v. *Congdon*, 14 R. I. 458; *Jenkins* v. *State*, 22 Wyo. 34.

It is true there is disagreement as to the nature and function of a view. On the one hand, the assertion is that its purpose is merely to acquaint the jury with the scene and thus enable them better to understand the testimony, and hence it forms no part of the trial and is not the taking of evidence. On the other, the suggestion is that the jury are bound to carry in mind what they see and form their judgment from the knowledge so obtained, and so the view amounts to the taking of evidence.[28] The distinction seems too fine for practical purposes; but however that may be, discussion of this abstract question is unimportant in a case like the present where the view was held to be evidence, and the jury were expressly so instructed.

The respondent urges that whatever may have been the petitioner's right, the record demonstrates he could have suffered no harm by reason of his absence. The argument is far from convincing in the light of the circumstances and the rule announced by the court as respects the use the jury were at liberty to make of the knowledge gained by their view of the premises. But if it were clear that the verdict was not affected by knowledge gained on the view or that the result would have been the same had the appellant been present, still the denial of his constitutional right ought not be condoned. Nor ought this court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered

[27] *Elias* v. *Territory*, 9 Ariz. 1; *Shular* v. *State*, 105 Ind. 289; but see *Barber* v. *State*, 199 Ind. 146; *State* v. *Rogers*, 145 Minn. 303; *People* v. *Thorn*, 156 N. Y. 286; *State* v. *Sing*, 114 Or. 267, 274; *Comm.* v. *Van Horn*, 188 Pa. 143; *State* v. *Collins*, 125 So. Car. 267. The last mentioned case, while apparently a decision against the right, contains but a mere statement on the subject without reference to the occurrences at the trial, and is probably based upon a waiver. It cites as authority *State* v. *Suber*, 89 So. Car. 100, which is a clear case of waiver. If this is not so the case appeaatly stands alone.

[28] Compare with cases cited in note 25 the following: *Jenkins* v. *State*, 22 Wyo. 34; *State* v. *Hartley*, 22 Nev. 342; *People* v. *Thorn*, 156 N. Y. 286; *Starr* v. *State*, 5 Okla. Cr. Rep. 440; *State* v. *Lee Doon*, 7 Wash. 308.

by the denial. To pivot affirmance on the question of the amount of harm done the accused, is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him. As this court has recently said with respect to disregard of the mandate of the Sixth Amendment respecting trial by jury:[29]

"But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived. . . . It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if in our opinion, it is not, relatively, as bad as it might have been."

A distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is inflicted and the substantial rights of the citizen are not infringed; the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if the result is just, though the hearing was unfair.

In this case, the view was a part of the trial. The jury were not sent to the scene in the custody of bailiffs who had no knowledge of the place or the circumstances of the crime. They were not instructed to view the premises so as to better understand the testimony. They went forth with the judge presiding, the stenographer officiating, the District Attorney and the counsel of the defendants. As has been shown, more than a mere view of the premises was had. Matters were called to the jury's attention in detail so that they could form judgments of distance, relative position, the alinements of objects, all having a crucial bearing upon the truthfulness of the testimony subsequently given, and they were

[29] *Patton* v. *United States*, 281 U. S. 276, 292.

told they might take their own estimates of these matters in corroboration or contradiction of the other evidence. Little wonder, in these circumstances, that the court felt it right to appoint the defendants' counsel to accompany the jury on the view. If the prisoners were entitled to this protection, by the same token they were entitled themselves to be present.

I think that the petitioner was deprived of a constitutional right and that the judgment should be reversed.

Mr. Justice BRANDEIS, Mr. Justice SUTHERLAND and Mr. Justice BUTLER concur in this opinion.